The Folly of Uniformity? Lessons from the Restatement Movement

Kristen David Adams

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THE FOLLY OF UNIFORMITY?
LESSONS FROM THE RESTATEMENT MOVEMENT

Kristen David Adams*

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* Associate Professor and Leroy Highbaugh, Sr. Chair in Faculty Research, Stetson University College of Law. This article is the first fruit of more than a decade of research on the Restatement movement, which has fascinated me ever since I began the formal study of law. I gratefully acknowledge the steadfast support of the faculty and administrators of the College of Law for the extensive study that this research has required. My research was underwritten with a generous grant from the College, and Dean Darby Dickerson, Professor Robert Batey, Leeanne Frazier, Professor Peter Lake, Professor Marleen O'Connor-Felman, and Jo Ann Palchak were each kind enough to read and provide valuable comments on this article in draft form. I also greatly appreciate the encouragement of the Honorable Guido Calabresi, Dean Emeritus Anthony Kronman, and Professors Robert Ellickson and Owen Fiss, all of the Yale Law School, who were supportive of my research during my studies at Yale. Stetson College of Law alumni Lindsay Campbell, Catherine Guthrie, Christopher Kaiser, and Brittain Mitchell provided valuable research assistance and were instrumental in securing rare sources from the Virgin Islands.
There are certain ideas of uniformity that sometimes seize great spirits, . . . but that infallibly strike small ones. They find in it a kind of perfection they recognize because it is impossible not to discover it: in the police the same weights, in commerce the same measures, in the state the same laws, and the same religion in every part of it. But is this always and without exception appropriate? . . . And does not the greatness of genius consist rather in knowing in which cases there must be uniformity and in which differences? . . . When the citizens observe the law, what does it matter if they observe the same ones?¹

I. THE RESTATMENTS IN THE VIRGIN ISLANDS: MODELING THE PROBLEM

This article will examine the way in which the American Law Institute's Restatements have influenced the development of United States common law. In so doing, the article's vehicle will be the Virgin Islands, which by statute have adopted the Restatements in their entirety as the Islands' de facto common law.² The article's thesis is that the Virgin Islands, using a speciation analogy drawn from evolutionary biology,³ would otherwise have been an excellent environment for studying the natural development of a common law tailor-made for the community, as the Islands are physically separated and politically isolated from the rest of the United States⁴ and contain a population with unique characteristics and needs.⁵ Because of their geographic and political isolation, I have referred to the Virgin Islands as a "legal backwater."⁶ Using the language of evolutionary biology, a backwater is often a valuable creative engine and resource.⁷ Because, however, the Islands have employed the Restatements as their default common law, the natural development of Virgin Islands law has been interrupted.⁸ This effect has become more significant as the Restatements have become more normative over time and also have been subjected increasingly to interest group politics.⁹ In the same way, examining the Restatement movement more generally, the movement has encouraged

² See infra note 20 and accompanying text.
³ See infra notes 133, 134, 141 and accompanying text.
⁴ See infra note 119 and accompanying text.
⁵ See infra notes 120-22 and accompanying text.
⁶ See infra note 118 and accompanying text.
⁷ See infra notes 133-41 and accompanying text.
⁸ See infra notes 20-31 and accompanying text.
⁹ See infra notes 60-73 and accompanying text.
an artificial clean-up of the common law and has discouraged the very backwaters that might otherwise have served, through speciation, as resources for the development of the law in the manner that best serves the needs of the community. The crucial question, which this article seeks to answer, is whether the Restatements have provided an effective substitute. Ultimately, this question turns on the manner in which the courts employ the Restatements.

The balance of the introduction explores the way in which the Restatements have been employed in the Virgin Islands and the manner in which this decision has affected the natural development of the Islands’ common law. The second section describes the Restatement movement—both its history and the way it has changed over time. The third section examines arguments in favor of the courts’ use of the Restatements and suggests that their enumerated positive attributes may not, standing alone, outweigh any negative consequences of the Virgin Islands’ use of the Restatements as de facto common law. The fourth section briefly examines, for purposes of comparison, the natural common-law-making process in jurisdictions outside the Virgin Islands. The fifth section defines the term “legal backwater,” introduces the evolutionary biology analogy, and explains why studying the Virgin Islands is productive in illuminating the effect of the Restatement on the development of U.S. common law more generally. The sixth and final section seeks to discover whether the courts have utilized limits that govern the use of the Restatements, so as to ameliorate any potentially distorting effect. In each section, the intent is to use examples from the Islands that may be applied more generally to all jurisdictions currently employing the Restatements in any capacity, so as to illuminate the manner in which the Restatements are used throughout the United States.

The Virgin Islands are one of only two jurisdictions (the other being the Commonwealth of the Northern Mariana Islands) in which the Restatements have been adopted as de facto common law, by statute.

Having done so, the legislature of the Virgin Islands has elevated the

10. See infra notes 116-41 and accompanying text.
11. See infra notes 20-39 and accompanying text.
12. See infra notes 40-78 and accompanying text.
13. See infra notes 79-87 and accompanying text.
14. See infra notes 88-115 and accompanying text.
15. See infra notes 116-66 and accompanying text.
16. See infra notes 167-206 and accompanying text.
17. See infra note 20 and accompanying text.
18. See infra note 20 and accompanying text.
Restatements from persuasive authority to controlling authority in matters of first impression.\(^\text{19}\) Thus, although the Restatements have been generally influential in jurisdictions across the United States, their influence is particularly concentrated in the Virgin Islands.

The relevant statute is Title 1, § 4 of the Virgin Islands Code Annotated, which provides as follows:

> The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.\(^\text{20}\)

Although the statute has been applied in over two hundred reported cases, its language has never expressly been interpreted.\(^\text{21}\) Therefore, the statute remains unclear as to whether the language "as expressed" means that Virgin Islands courts are expected to undertake an independent analysis of whether the Restatements express United States common law, or whether the courts are to assume that, when the Restatements have purported to express common law, they have done so accurately.

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19. See infra note 20 and accompanying text.
20. 1 V.I. CODE ANN. § 4 (2000). The Commonwealth of the Northern Mariana Islands adopted a very similar provision in its 1984 code. 7 N. MAR. I. CODE § 3401 provides as follows:
   > In all proceedings, the rules of the common law as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary; provided that no person shall be subject to criminal prosecution except under the written law of the Commonwealth.
7 N. MAR. I. CODE § 3401 (1997). This article will employ cases from the Northern Mariana Islands, when relevant, to supplement those from the Virgin Islands. The Northern Mariana Islands share many of the qualities that have caused me to term the Virgin Islands a legal backwater. See infra notes 119-22 and accompanying text (describing pertinent characteristics of the Virgin Islands).

The Northern Mariana Islands were formerly part of the Trust Territory of the Pacific, which the United Nations granted to the United States in 1947. In 1975, the Islands decided, rather than seeking independence, to seek a closer relationship with the United States. A covenant was approved to establish the Commonwealth as a political union with the United States. In 1986, the islands became a United States Commonwealth, and their residents became United States citizens. See CIA World Factbook 2003, available at www.cia.gov/cia/publications/factbook/geos/cq.html. The Islands share a number of characteristics with the Virgin Islands, including geographic isolation from the United States mainland, particular susceptibility to weather-related disasters, primary reliance upon tourism for revenue, low-fertility soil, a recent focus on developing small manufacturing industries, and little immigration from the United States. Like residents of the Virgin Islands, residents of the Northern Mariana Islands are United States citizens but do not vote in national elections. Compare infra notes 119-22 and accompanying text with CIA World Factbook 2003, available at www.cia.gov/cia/publications/factbook/geos/cq.html.

Specifically, it has never been determined whether the phrase "as expressed" requires only that the Restatements have addressed an area of United States common law, or requires that they have done so accurately. At least one court has assumed that the former approach is the appropriate one. In the meantime, without deciding the issue, it appears that the courts have interpreted the statute in varying ways. Some courts simply recite the ambiguous language of the statute. Other courts, rather than using the specific language of the statute, refer variously to the Restatements to the common law of the United States as captured in the Restatements, or simply to the common law of the United States, in describing the authority they are to follow. In

22. Christian v. Newfound Bay, 144 F. Supp. 2d 420, 429 (D.V.I. 2001) ("[U]nder § 4, the Court must look first to the common law rules set forth in the various Restatements. If no rules are available, the Court is to look to common law rules "as generally understood and applied in the United States." (quoting Dunn v. Hovic, 1 F.3d 1371, 1387 (3d Cir. 1993) (citations omitted)).


24. See Benjamin v. Cleburne Truck & Body Sales, Inc., 424 F. Supp. 1294, 1297 (D.V.I. 1976) ("1 V.I.C. § 4 incorporates into the law of the Virgin Islands the rules expressed in the restatements of the law . . ."); Bower v. O’Hara, 759 F.2d 1117, 1124 (3d Cir. 1985) ("[W]e are directed to the text of the Restatements, and we may look beyond them only if no rule of decision is there expressed."); Co-Build Cos., Inc. v. Virgin Islands Refinery Corp., 570 F.2d 492, 494 (3d Cir. 1978) ("When no precedents relate specifically to the adjudication of a Virgin Islands dispute, the courts are directed to turn to the various Restatements of Law, approved by the American Law Institute, which are to provide the rules of decision for such cases in the absence of local laws to the contrary."); Bd. of Dirs. v. Consol. Int’l., Inc., 28 V.I. 57, 75 n.12 (V.I. Terr. Ct. 1993) ("In the absence of written or case law to the contrary, the Restatements of the Law are the rule of law in this jurisdiction."); Wilson v. Joseph, 28 V.I. 29, 33 n.2 (V.I. Terr. Ct. 1992) (same holding).


addition, it seems clear, when no Restatement provision exists on point, and the common-law decisions are split, that Virgin Islands judges are free to exercise their discretion in selecting the sounder rule.27 As is discussed below in Part VI, this uncertainty may present an opportunity for flexibility, providing a means by which judges can choose to avoid the application of Restatement rules they believe to lack substantive merit.

The origins of this statute are in the Islands' history as a Danish colony, during which time the Islands' law was based on the common law of Denmark.28 Following the Islands' becoming a dependency of the United States in 1917, the Islands' new code of 1921 included language similar to that of the codes that were in place under Danish rule, but now


27. See Christian, 144 F. Supp. 2d at 429 ("Where the Restatement is silent and a split of authority exists, the Courts should select the sounder rule.").

28. The Virgin Islands of the United States formerly were called the Danish West Indies. Bette A. Taylor, CRS Report for Congress: The Virgin Islands of the United States: A Descriptive and Historical Profile CRS-3 (June 13, 1988).

Sections 67, respectively, of the Colonial Law for the Danish West India Islands of November 27, 1863 and the Colonial Law for the Danish West India Islands of April 6, 1906 . . . , provided that “the Common and Statute Law of Denmark shall as hitherto be applicable in the colonies, as more accurately defined by the Laws and Ordinances.”

See History, 1 V.I. CODE ANN. § 4.

The Islands are now an organized, unincorporated United States territory. Taylor, supra at CRS-29-30 (describing the implications of “unincorporated” status, including the fact that Congress is “bound only by certain ‘fundamental’ guarantees of the Constitution” with regard to the unincorporated dependencies of the United States); John Willis Walters, A Political History of the United States Virgin Islands, 1917 to 1967, at 34 (1979) (unpublished Ph.D. dissertation, Princeton University) (on file with author) (“The Constitution and laws of the United States would not immediately apply to the newly acquired territory because it was not an ‘organized territory.’”); Gregory R. La Motta, The Americanization of the Virgin Islands, 1917-1946: Politics and Class Struggle During the First Thirty Years of American Rule 71 (1992) (unpublished Ph.D. dissertation, University of Maryland) (on file with author) (noting that such “Supreme Court rulings pushed small colonies such as the Virgin Islands into an often desperate struggle to get Congress to pay attention to their particular needs”).

Today, some vestiges of this separate and subordinate role remain in the relationship between the federal government and Virgin Islanders. Residents of the Virgin Islands elect a single, nonvoting delegate to the United States House of Representatives. Taylor, supra at CRS-43. Virgin Islanders do not participate in the election of the President of the United States. Id.

During the 17th Century, the Islands were divided into English and Danish territories. After negotiations dating back to the United States Civil War, in 1917, the United States purchased the Danish territory for $25 million. Id. at CRS-61 (describing the initial discussions between Danish Minister Waldemar R. Raasloff and Secretary of State William H. Seward in 1865); Id. at CRS-68 (describing the eventual purchase). March 31, a territorial holiday in the Islands, marks the Islands’ transfer from Denmark to the United States, which took place in 1917. Id. at CRS-68 (describing the formal transfer ceremonies in Charlotte Amalie in St. Thomas).
focused on the common law of the United States rather than that of Denmark. It does not appear that there was any immediate intention to permit the Islands to create their own laws. After so many years of colonial rule, it may have felt more natural to the Islands at that time to look to the United States, an external source, for their laws.

The Virgin Islands Code was revised in 1957 to include a specific reference to the Restatements for the first time. This revision followed the Third Circuit case of Callwood v. Virgin Islands National Bank.

The Callwood court, considering a conflict-of-laws dispute, held in relevant part as follows:

The generally accepted common law rule of conflict of laws is that the effect of an assignment of a chose in action is determined by the law of the place where the assignment is executed. This is the rule laid down

29. "Section 6 of Chapter 13 of Title IV of the 1921 Codes [of St. Thomas, St. John, and St. Croix] . . . provided that 'The common law of England as adopted and understood in the United States shall be in force in this District, except as modified by this ordinance [code].'" Taylor, supra note 28, at CRS-68; see also Smith v. deFreitas, 329 F.2d 629, 633 n.2 (3d Cir. 1964) (indicating that the common law of the United States came into force in the Virgin Islands on July 1, 1921). Until that time, Danish common law continued to be in force. La Motta, supra note 28, at 72 ("To emphasize the continuity between Danish and American sovereignty, Section II of the [Congressional] Act [of March 3, 1917] stipulated that the Danish Colonial Law of 1906 would remain the basic law of the Virgin Islands."). Indeed, it appears that some of the Naval governing officials enjoyed the increased power that the Danish law provided to them during this time. Id. at 74 ("Instead of working to establish an independent judiciary, the governors sought to retain their powers over judges granted them by the Danish laws.").

30. "It was presumed that the masses were not sufficiently Americanized to assume the responsibility of democratic government." Walters, supra note 28, at 54; see also La Motta, supra note 28, at 66 ("Viewing themselves as teachers of the ‘American way of life,’ the Navy officials felt obliged to instruct an inferior people in a better manner of living."). Walters indicates that this sentiment on the part of the United States government may have been grounded in racial prejudice. Walters, supra note 28, at 64 ("Governor Evans [appointed by the U.S. Government for the term 1927-1931] maintained the policies of previous governors—economic and social reform before political advancement. He, too, thought that blacks were not ready to run their own affairs."). See also La Motta, supra note 28, at 68 ("Their new rulers' racism shocked and disappointed Virgin Islanders."). As early as 1925, an "all-black commission" appointed by the Governor of the Virgin Islands "recommended the . . . adoption of a unified code of laws, based on American law, for the Virgin Islands." Walters, supra note 28, at 62-63.

31. For a discussion of the influence of United States culture on the Virgin Islands, and the high initial hopes of the Virgin Islands people for their new relationship with the United States, see Walters, supra note 28, at 99. Walters quotes influential Virgin Islands newspaper editor Rothschild Francis, editor of The Emancipator from 1919 to 1927, as follows:

Francis maintained that Virgin Islanders "have always clamored for America and things American; our lives, our customs and traditions have been molded and patterned more after Americans than after Denmark and Danes; and we accepted the transfer with hearts full of throbbing pulsation and high hopes for our future betterment under the Starry Banner."

Id.

32. 221 F.2d 770 (3d Cir. 1955).
in the Restatement of Conflict of Laws. It is, therefore, to be applied in the Virgin Islands in the absence of a local statute or rule to the contrary. For the Virgin Islands have adopted the rules of the common law of England as followed and understood in the United States and we think that the district court in applying those rules is justified in following the well considered expressions of them which the American Law Institute has incorporated in its Restatements of the Law.\textsuperscript{33}

Perhaps it is significant that the author of the opinion, Judge Albert Maris, was an active member of the American Law Institute at that time.\textsuperscript{34} It is also important to note that this decision was not made by a

\textsuperscript{33} Id. at 774-75 (citations omitted). The last sentence is, of course, the critical part of this holding.

\textsuperscript{34} Judge Maris was a member of the advisory committee to the American Law Institute's Study of the Division of Jurisdiction Between State and Federal Courts, published in 1969. American Law Institute, \textit{ALI Catalog}, http://www.ali-aba.org/ali/stu_jur_fed.htm (last visited Feb. 9, 2005). He was also an advisor to the \textit{Restatement of Law, Conflict of Laws}. Id.

It is difficult to get an accurate picture of Judge Maris, a President Franklin Delano Roosevelt appointee to the United States District Court for the Eastern District of Pennsylvania, elevated by Roosevelt two years later to the Third Circuit Court of Appeals and, at the time of his death in 1989, after 52 years on the bench, the longest-serving federal judge in United States history. Dolores K. Sloviter, \textit{Memorial Tribute to the Honorable Albert Branson Maris}, 1893-1989, 62 \textit{TEMP. L. REV.} 471, 475-76 (1989) (noting that “Judge Maris’ last opinion was filed the day before he died”). On the one hand is the loving tribute paid to him by fellow Third Circuit Judge and American Law Institute member Dolores K. Sloviter, in which he is described as “the Moses for the Virgin Islands” and “‘practically the patron saint’ of those islands.” \textit{Id.} at 473, 475 (“Judge Almeric Christian frequently has said that Virgin Islands residents believe ‘that when Judge Maris comes down to the Virgin Islands, he eschews boat and plane. He walks.’”). \textit{Id.} at 473. Judge Sloviter describes Judge Maris’ work in the Virgin Islands as follows:

He wrote its Organic Act in 1954, replacing the outdated 1936 Act; was a member of the Commission that codified the laws of the Virgin Islands into the Virgin Islands Code and arranged for its printing; and authored the consolidation in 1964 of the Islands’ separate municipal courts into one judicial body. \textit{Id.} at 473. She goes on to describe the influence of his work as follows:

Almost single-handedly, he organized their system of laws and judiciary. It was said of him, “the Virgin Islands’ mind cannot conceive of a single aspect of our affairs in our upward struggle which was not the legatee of Judge Maris’s deep concern and wisdom. Spiritual godfather of us all, he has unstintingly given of himself without heed to personal sacrifice.” His contribution has been colossal. \textit{Id.} at 475. In further describing his career, Judge Sloviter emphasizes his position as Chairman of the Judicial Conference’s Committee of Revision of the Laws of the United States, his receipt of the first Virgin Islands Gold Medal of Honor, and his service as Special Master for the United States Supreme Court. \textit{See id.} at 472-73. Judge Sloviter delivered near-identical remarks at the Joint Session of the United States Court of Appeals for the Third Circuit and the United States District Court for the Eastern District of Pennsylvania in Memory of Albert Branson Maris on March 9, 1989. 894 F.2d 3 (1989).

On the other hand are the statements of Professor Mark Tushnet in his review of the 1985 book by Gilbert Ware, \textit{William Hastie: Grace under Pressure}. Mark Tushnet, \textit{Being First}, 37 \textit{STAN. L. REV.} 1181 (1985). William Hastie was the first Governor of the Virgin Islands, having been appointed in 1946, and served as Governor during a portion of Judge Maris’ tenure on the Third
local court of the Virgin Islands, but instead by the United States Court of Appeals for the Third Circuit in its position of general appellate jurisdiction over all matters heard, not only by the United States District Court in the Virgin Islands, but also by local Territorial Courts. Thus, this cannot be fairly characterized as the ruling of a local court of the Virgin Islands. In what became 1 V.I. Code Ann. § 4, the Virgin Islands Senate codified the Callwood holding. The Senate described its decision as follows:

As set out herein, the provisions have been rewritten more accurately to express the concept of the Common Law as constituting a body of rules established by precedent, as distinguished from a body of

35. Prior to 1976, the United States District Court of the Virgin Islands had original and exclusive jurisdiction over all territorial civil and criminal matters. After the Territorial Court of the Virgin Islands was established in 1976, the Islands began to transfer concurrent jurisdiction over all local matters to the new court from the District Court. See Parrott v. Gov't of the Virgin Islands, 56 F. Supp. 2d 593, 595 (D.V.I. 1999) (citing 4 V.I. CODE § 76(a)). As of January 1, 1994, the process was complete and the District Court was fully divested of its original jurisdiction over all local matters. Id. When this process was complete, the District Court had only the limited jurisdiction of any other United States District Court. Id. (further stating, "[although the emergence of separate local and federal judiciaries in the Virgin Islands is a salutary development, our institutions and laws have experienced some growing pains."). At this time, the United States Court of Appeals for the Third Circuit continues to have general appellate jurisdiction over decisions rendered by both the District Court and the Territorial Courts, pursuant to 48 U.S.C. § 1613. Taylor, supra note 28, at CRS-42; see also V.I. Revised Organic Act of 1954 § 23 (1995) ("[f]or the first fifteen years following the establishment of the appellate court authorized by section 21(a) of this Act, the United States Court of Appeals for the Third Circuit shall have jurisdiction to review by writ of certiorari all final decisions of the highest court of the Virgin Islands from which a decision could be had."); Parrott v. Gov't of the Virgin Islands, 230 F.3d 615, 618 (3d Cir. 2000) (describing the current jurisdiction of both the District Court and the Third Circuit). The President appoints judges to the District Court, and the Governor appoints the judges sitting on the Territorial Court. Taylor, supra note 28, at CRS-41, CRS-42. To date, the Virgin Islands have not developed their own Supreme Court, although there has been some showing of interest, among members of the legal community, in doing so. Virgin Islands Bar Elects Officers; Advocates Establishing VI Supreme Court, V.I. BAR HERALD, Mar. 11, 2002 (quoting Chief Deputy Attorney General Alva Swan as saying, "the time has come for the Virgin Islands to have its own court of appeals"). President Tom Bolt echoed this sentiment: "It is . . . important," he stated, "that we educate the Virgin Islands public as to the critical need to remove this last vestige of judicial colonialism." Id. 36. See supra note 20 and accompanying text.
statutory law, and to extend the application of the rules to the restatements of the law prepared and approved by the American Law Institute.\(^37\)

In enacting the new statute, the Senate expanded *Callwood* in an important respect. In *Callwood*, the court had acted as many other United States courts have in adopting a single provision of a single Restatement, having determined that provision to represent accurately the common law of the United States. Indeed, as is discussed below in Part IV, this is how common-law courts historically have made law, moving slowly and incrementally, one case at a time.\(^38\) The Virgin Islands Senate followed the *Callwood* court’s incremental, ordinary step with a sweeping, extraordinary measure by declaring that all provisions of all Restatements were to be considered as being representative of United States common law. As the citations in Part II demonstrate, the nature of the Restatement movement has changed over time to become more normative and possibly also more vulnerable to interest-group politics.\(^39\) As this trend has developed, the implications of the Senate’s decision have changed accordingly.

### II. THE RESTATEMENT MOVEMENT, ITS VISION AND PHILOSOPHY

The American Law Institute was founded in 1923.\(^40\) Its founding was the result of a study conducted by a “committee on the establishment of a permanent organization for the improvement of law.”\(^41\) The committee, consisting of prominent judges, attorneys, and

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37. History, 1 V.I. CODE ANN. § 4 (citing *Callwood*, 221 F.2d at 770).
38. See infra notes 88-115 and accompanying text.
39. See infra notes 40-73 and accompanying text.
law professors, was responding to what it felt were two major defects in American law: its uncertainty and complexity. The committee found that these two defects "had produced a general dissatisfaction with the administration of justice." Out of these concerns, the committee formed the American Law Institute, which has, ever since that time, undertaken to restate certain areas of the common law of the United States. The first Restatements were intended to address "basic legal subjects" and to "tell judges and lawyers what the law was."

42. ALI, Anniversary, supra note 40, at 9 (describing the "deplorable state of the law" prior to the Restatements). According to the committee, part of the uncertainty of the law, as it then existed, was due to the lack of agreement among members of the profession on "the fundamental principles of the common law." Id. Other causes of uncertainty were reported as "lack of precision in the use of legal terms," "badly drawn statutory provisions," and "the great volume" of reported decisions. Id. "The law's complexity, on the other hand, was attributed in significant part to its 'lack of systematic development' and to its numerous variations within the different jurisdictions of the United States." See American Law Institute, About the American Law Institute [hereinafter ALI, About the ALI], available at http://www.ali.org/ali/thisali.htm. This article will argue in favor of the variety of law, regardless of whether it stems from adaptation to different environments or simply from varying efforts to address the same question. Exceptions should be made for areas of law, such as the Uniform Commercial Code, in which uniformity is essential due to the expectations of interstate commerce. Property law and tort law, by contrast, are essentially local in nature.

43. ALI, About the ALI, supra note 42.

44. The Council and membership of the Institute must approve any new Restatement project before it begins. ALI RULES OF THE COUNCIL 11.02 (A) ("Material intended for publication must first be submitted to the Council, and by it to the members."). After the concept is approved, an expert in the field is designated to serve as the reporter for the project. Id. at 10.01 ("Each project of the Institute is normally put in the charge of a reporter or reporters authorized by the Director with the approval of the Council or the Executive Committee."). The reporter, along with assistants, prepares an initial draft and is responsible for the body of research to be done, so as to complete the project. Id. at 10.02 ("The Director may, with the approval of the Council or the Executive Committee, appoint advisors or consultants to review a reporter's drafts, and may employ assistants to aid a reporter."). See infra note 75 and accompanying text for a discussion of how two reporters, Judge Cardozo and Justice Traynor, supposedly used their positions in the American Law Institute to advance their own hoped-for changes in the law.

When complete, the initial draft is submitted to a group of ten to thirty advisors who, like the reporter, are experts in the area being restated. ALI RULES OF THE COUNCIL 10.02 (authorizing the appointment of advisors to review a draft). In addition, most initial drafts are reviewed by a members consultative group. Id. at 10.03 ("The Director may establish a members consultative group for an Institute project to review a reporter's drafts."). This group consists of Institute members with particular interest in the area. Id. ("Any member of the Institute may join a members consultative group, the meetings of which may be held with some or all members at times and places designated by the Director."). See infra notes 76-78 and accompanying text for a discussion of how low participation rates among American Law Institute members may have resulted in domination of the Restatement drafting process by an interested few. See also Lawrence J. Latto, The Restatement of the Law Governing Lawyers: A View from the Trenches, 26 HOFSTRA L. REV. 697, 700, 702 (1998) (Latto reports the same phenomenon and further notes the many other demands on members' time, especially that of associate reporters. He concludes that the resulting product is thus necessarily the brainchild of the Reporter.).
Despite the project's name, some evidence suggests that the Restatements were never meant simply to re-state the common law of the United States. The language of the Institute's charter is illustrative: its purpose is "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work."

The Council of the Institute considers the draft once it has been approved by the advisors and the members consultative group, and any revisions have been made. ALI RULES OF THE COUNCIL 11.02 (B) ("The Council may submit the material to the membership with or without the Council's approval, amendment, or recommendation."). The Council typically has about seventy members. American Law Institute, Annual Report of the American Law Institute 2002, at 66-67, available at http://www.ali.org (listing the sixty-nine current members of the council); see also BYLAWS OF THE AMERICAN LAW INSTITUTE 4.02 (requiring that the Council consist of at least 42 members). Once the Council has approved the draft, it becomes known as a Tentative Draft. See ALI, About the ALI, supra note 42. "The membership may approve the Tentative Draft, subject to any revisions agreed to, or refer it back to the Reporter and Advisers for additional consideration." Id. See infra notes 168-74 and accompanying text for a discussion of cases in which the courts of the Virgin Islands have considered the proper weight to be afforded a Tentative Draft. The final step in the process is a Proposed Final Draft, which consists of all prior Tentative Drafts. See ALI, About the ALI, supra. The Proposed Final Draft becomes an official text of the Institute and is ready for publication after it has been approved by both the Council and the full membership. Id.

The first series of Restatements were written between 1923 and 1944 and covered the topics of Agency, Conflict of Laws, Contracts, Judgments, Property, Restitution, Security, Torts, and Trusts. ALI, Anniversary, supra note 40, at 40 (listing the past and present projects of the Institute). In addition, Restatements of Business Associations and Sales of Land were begun but not completed. The second Restatement series, begun in 1952, added Landlord and Tenant Law as a subsection of the Restatement of Property and further added a Restatement of the Foreign Relations Law of the United States. Id. The third Series began in 1987 and included for the first time the Law Governing Lawyers. Id.

The Rules of the Council authorize an elected membership of 3,000 judges, lawyers, and law professors from the United States and around the world. ALI RULES OF THE COUNCIL 1.01. In addition, the Chief Justice and Associate Justices of the Supreme Court of the United States, the Chief Judges of each United States Court of Appeals, the Attorney General and Solicitor General of the United States, the Chief Justice or Chief Judge of the highest court of each state, law school Deans, and the Presidents of the American Bar Association, each state bar association, and other prominent legal organizations are ex officio members. Id. at 1.03 (noting that some of these individuals are made members for life, while others are members only during their terms of office). After 25 years, elected members are eligible to become life members and, as such, are no longer counted among the 3,000. Id. at 1.02 (indicating that life members are not numbered among the 3,000); Id. at 1.05 (describing the requirements for life membership). The total current membership is about 3,600. See ALI, About the ALI, supra note 42.

45. ALI, About the ALI, supra note 42.

46. American Law Institute, Certificate of Incorporation, in Annual Report of the American Law Institute 2002, supra note 44, at 51; see also http://www.ali.org for the Certificate of Incorporation. In addition, Livingston Hall used the following language in praising law professor Warren Seavey for his early role in the Restatement movement: "He believed the form of the Restatements to be an ideal vehicle through which law teachers might influence the development of case law. Written for lawyers and judges, the Restatements served 'to bring back to our American law some semblance of order and consistency,' as he phrased it."
Institute continues to struggle, some eighty-one years after its founding, to determine what its mission is and should be.47

One scholar has challenged whether simple clarification of the law without undue distortion is even possible, given the rich and complex historical and contextual nature of the common law.48 It is arguable that the very nature of re-stating the law, publishing it in what is declared to be a summary form, requires some change, some artificial cleaning-up of the law. Borrowing from the language of Roscoe Pound in describing the nature of enactment of the law, the publication of the law necessitates changing the law by presenting the law as being more consistent than it truly is.49 Robert Berring makes the point more strongly: “There is no underlying rational structure to the law...other than what the positivists give it.”50

Livingston Hall, Warren Seavey and the Age of the Restatement, 79 Harv. L. Rev. 1329, 1330 (1966). It is possible to argue that a professor’s participation in the American Law Institute’s Restatement project constitutes a conflict of interest. For teachers, consistency makes law more teachable. Indeed, Hall’s description of Seavey’s participation in the process draws this parallel.

I have always believed that Seavey thought in Restatement terms. Logical order, internal consistency, completeness, clear illustrative cases, brevity—these were his intellectual goals...His Restatements created a unified and teachable body of law out of the mass of independent doctrines of agency, contracts, and master and servant bequeathed to him by his intellectual predecessors in the field.

Id. at 1331.

47. Charles W. Wolfram, Bismarck’s Sausages and the ALI’s Restatements, 26 Hofstra L. Rev. 817, 818 (1998) (“Notwithstanding the rather clear implication that the work of this organization would consist of more than meekly parroting existing law, the ALI perennially witnesses struggles over the concept of a Restatement.”).

48. James Gordley, European Codes and American Restatements: Some Difficulties, 81 Colum. L. Rev. 140, 140 (1981) (quoting earlier Restatement scholar and critic Charles Clark as “complain[ing] of the ‘attempt to force a black letter sentence to do what it can never do—state pages of history and policy and honest study and deliberation’”). Gordley goes on to “suggest[...] that clarity and simplicity are not advantages that should be sought from a restatement or a civil code: either they cannot be obtained or the cost of obtaining them is too high.” Id.

49. Roscoe Pound, An Introduction to the Philosophy of Law 4 (Yale Univ. Press 1982) (rev. ed. 1954) (noting that “popular demand for publication results in a body of enactment”). Pound states as follows, in describing the law-making process in Greek law during the Hellenistic Period: “At first enactments are no more than declaratory. But it was an easy step from publication of established custom to publication of changes as if they were established custom and thus to conscious and avowed changes and intentional new rules through legislation.” Id.

50. Berring, supra note 41, at 26. Berring presents the problem as hardly being new. He describes chronicler of the law William Blackstone, according to his critics, as “bending the data to fit his needs.” Id. at 16; see also Daniel J. Boorstin, The Mysterious Science of the Law: An Essay on Blackstone’s Commentaries 22 (Univ. of Chicago Press 1996) (1941) (describing Blackstone’s commentaries as follows: “Any data that could not be distilled into ‘principles’ could be disregarded for they were by definition no part of a ‘science of law.’”). Berring’s description of the modern West Digest reporting system raises similar concerns about the artificial elimination of outlier results. Berring, supra note 41, at 25 (“Language and concepts were normalized as the West editor prepared the headnotes for each case.”).
An early, conscious decision was made not to pursue codification of the Restatements.\(^{51}\) Instead, the Restatements are to have only persuasive authority.\(^{52}\) Although this appears to be an uncontroversial point on which the American Law Institute has remained steadfast over time, one scholar has asserted that—at least initially—the Restatements were meant to supersede the common law.\(^{53}\) Whatever the initial goal of the Restatements, it is clear that the American Law Institute’s reputation is important to the success of these, its most significant product.\(^{54}\) Because of the high level of respect that the American Law Institute has earned, the Restatements’ taking a certain position is likely to influence the development of the law.\(^{55}\) One scholar goes so far as to assert that the Restatements’ adoption of a given rule of law may “bait” other courts to follow its analysis, even if flawed.\(^{56}\) Indeed, the American Law Institute

51. ALI, Anniversary, supra note 40, at 11 (noting that “the goal was to maintain the flexibility of the common law”). On this point, it is interesting that the Virgin Islands has done that which the American Law Institute would not.

52. See Schwartz, supra note 41, at 743 (“Although ALI restatements have no force of law on their own, they have had a persuasive impact on the courts.”); Frank J. Vandall, The American Law Institute is Dead in the Water, 26 HOFSTRA L. REV. 801, 814 (1998) (“The ALI can print anything it wants. First-year students are taught that Restatements are secondary authority and persuasive only.”).

53. Berring, supra note 41, at 23 (“This codification of the common law was intended to create an edifice that would make it unnecessary to refer to the larger underlying body of case law. Because they intended to supersede case law, the first Restatements did not even mention case names.”). Compare BOORSTIN, supra note 50, at 3 (describing Blackstone’s commentaries, as follows: “In the first century of American independence, the Commentaries were not merely an approach to the study of law; for most lawyers they constituted all there was of the law”).

54. Massey, supra note 41, at 424 (“Existing Restatements of domestic law [prior to the Restatement (Third) of Foreign Relations Law] already carried considerable weight because of the ALI’s eminence and the thoroughness of its drafting process.”); Brody v. Albert Lifson & Sons, Inc., 111 A.2d 504, 507 (N.J. 1955) (describing a form of negligence and stating, “This rule is set forth in section 302(b) of the ... Restatement of the Law, Torts (Negligence) and as such has the persuasive authority resulting from the scholarship and study of the members of the Institute who agreed to them.”).

55. Massey, supra note 41, at 424 (“Commentators ... noted that the Restatement (Third) [of Foreign Relations Law] might contribute to the formation of customary law, as foreign governments would rely on it when it supported their cases and use it against the U.S. government as a statement of U.S. practice, notwithstanding the Restatement (Third)’s disclaimer that it is an independent work and does not represent the view of the U.S. government as to its legal obligations.”); Allan F. Conwill & William W. Ellis, Jr., Much Ado About Nothing: The Real Effect of Amended 60(A) on Accounts Receivable Financing, 64 HARV. L. REV. 62, 66 (1950) (“The relative position of this rule [requiring that lien creditors be notified when contracts are assigned to third parties] was probably enhanced by its incorporation in the Restatement of Contracts ... ”).

itself represents that "[m]any Institute publications have been accorded an authority greater than that imparted to any legal treatise, an authority more nearly comparable to that accorded to judicial decisions." This degree of influence may be particularly likely when the Restatement is of an area of law with which many practitioners and judges are unfamiliar. In addition, when a legislature like that of the Virgin Islands adopts the Restatements as the de facto common law of the jurisdiction, the Restatements of the American Law Institute become precedential, rather than merely persuasive, authority. Due to the Restatements' influence as shown in these various ways, the American Law Institute has at times been instrumental in changing the course of American case law.

A. Changing Goals of the Restatement

Several scholars have stated that the persuasive authority of the Restatements depends on their being a true and accurate representation

counterpoint to Tarasoff and doomed to condemnation—its reliance upon the Restatement (Second) of Torts could bait other courts into following its flawed analysis." Id. at 1286.

57. See ALI, About the ALI, supra note 42.

58. Massey, supra note 41, at 424.

There was agreement that the Restatement (Third) [of the Foreign Relations Law of the United States] would be influential—even treated as a "bible" by judges and practitioners who are generally unfamiliar with international law and who may find it difficult to obtain evidence of state practice and opinio juris . . . . The likely influence of the Restatement (Third) magnified the importance of its stating customary law accurately, given the ALI's claim that its document reflected state practice and opinio juris.

Id. (citations omitted). Charles Wolfram, Chief Reporter for the Restatement of the Law Governing Lawyers, made a similar statement with regard to the Restatements generally:

Statutes, if minimally constitutional, will be enforced by courts, however much a constrained litigant may protest. Restatements can have the same dire consequence—relied upon by a tribunal for a proposition that burdens a litigant in a proceeding no matter how strenuous the litigant's argument that the Restatement provision in question has it wrong. Such realizations should serve to caution a Restatement-drafter who may otherwise be tempted to boldness. They also should require that . . . we feel free—if not, indeed, occasionally compelled—to strip down the machinery of a Restatement's production process to see whether the product it produces is worthy of being served up to nourish the body politic.

Wolfram, supra note 47, at 817-18.

59. Charles Wolfram notes, as an example of what he calls "the landscape-altering effect of occasional Restatement positions," "the amended provision on liability for defective products inaugurated by the Restatement (Second) of Torts, which can fairly be described as launching—for better or worse (with undoubtedly some of both)—the products liability field of litigation." Wolfram, supra note 47, at 820.
of the common law of the United States. This statement is particularly interesting in light of the continuing debate over whether the Restatement project has changed over time to become normative rather than descriptive in its approach to the law. Both courts and scholars have asserted that such a change has indeed taken place. One court has expressly stated its dissatisfaction in finding that the Restatements constitute a remaking, rather than a true restatement, of the law. Two scholars have taken the criticism a step further, asserting not only that the Restatement movement has changed over time, but also that this change has been hidden from the public.

60. See Guido Calabresi & Jeffrey O. Cooper, New Directions in Tort Law, 30 VAL. U. L. REV. 859, 866-67 (1996) ("The Restatement's influence depends on whether courts pay attention to it, which in turn depends on whether the Restatement actually reflects what is happening in the courts."); see also Latto, supra note 44, at 717.

The credibility of the Restatements depends heavily upon the fact that their black letter sections are, indeed, restatements of what the law is (or, in the view of competent objective observers, is likely someday soon to be), and not the opinion of a group of distinguished, largely mature lawyers about what the law should or ought to be. Id.; see also Vandall, supra note 52, at 815 ("To maintain its neutrality and effectiveness, the ALI must ask how it might return to its mission of restating the common law and avoid becoming merely another conservative voice for tort reform. Otherwise it is likely to remain dead in the water.") (citations omitted). The assertions of each of these scholars that the power of the Restatements is in their functioning as reliable re-statements of the common law, however, raise the question of whether the ALI's new path will be self-defeating. The question may remain open, in other words, to what extent a normative Restatement can continue to assert influence, good or bad.

61. See Massey, supra note 41, at 421.

After the ALI embarked on this project, a disagreement quickly arose between the proponents of two views of the Restatements' function: that of stating existing law and that of promoting desirable change in the law. After pursuing the former approach during its first two decades, the ALI changed course and began to adopt rules supported by a minority of jurisdictions when the majority rules seemed less sound.

Id. (citations omitted).

62. In the case of George v. Walton, 43 N.E.2d 515 (Ohio Ct. App. 1942), the court considered an argument as to the existence of an attorney's lien against personalty of the client in his or her possession. In rejecting the lower court's reliance on the Restatement of Agency to support its holding, the court of appeals stated as follows:

With all due deference to the high authority of the "American Law Institute" under whose auspices the "Restatement of the Law" has been prepared, our examination of the law has compelled us to conclude that no such general agent's lien as above stated, exists at common law and that the above paragraph if given a liberal construction, constitutes an attempt not to restate but rather to remake the law.

Id. at 517.

63. See generally W. Noel Keyes, The Restatement (Second): Its Misleading Quality and a Proposal for Its Amelioration, 13 PEPP. L. REV. 23 (1985). Keyes states that the Restatements "no longer even purport to 'restate' the law . . . yet they continue to use the term 'Restatement' as if they had maintained the goals of the original Restatements. For this lack of identification it is difficult to find any redeeming value." Id. at 24-25. Fred Zacharias makes the same point with regard to the Restatement of the Law Governing Lawyers. See Fred C. Zacharias, The Restatement and
Several scholars have responded to these criticisms about the Restatement project’s alleged change in vision, defending the work of the American Law Institute. Herbert Wechsler, former Director of the Institute, minimized the difference between normative and descriptive, stating that "there is no clear distinction between what the law ‘is’ and what it ‘should be.’"\(^{64}\) John Wade, who served, among other capacities with the American Law Institute, as Reporter for the *Restatement (Second) of Torts*, described the change in the Restatement project as simply an appropriate response to the way in which the common law-making process had itself changed.\(^{65}\) In his view, the current Restatements, like current court opinions, "are no longer discovering the true law," believing it to be something "existing independently of the actions of the courts," but "are instead in the process of managing the developing evolution of the common law in order to point it in the right direction."\(^{66}\) Assuming that the question, "Should [the American Law Institute] set out to produce a true ‘Restatement?’"\(^{67}\) is answered in the affirmative, the next task is to discern where the line is drawn between restating the law and stating what the law should be. Determining what the law is can be much more challenging than the casual observer might assume.\(^{68}\)

\(^{64}\) Massey, *supra* note 41, at 422. Massey notes that, "[i]n Wechsler’s view, ALI restators would view their role as a judicial one and would not ignore opportunities to fill gaps in the law." *Id.* at 78-79.


\(^{66}\) *Id.* at 63 ("Openly and frankly declaring that they are changing the law, they are ready to regard this action as part of the judicial function.").

\(^{67}\) Harold G. Maier, *The Utilitarian Role of a Restatement of Conflicts in a Common Law System: How Much Judicial Deference is Due to the Restaters or 'Who are these Guys, Anyway?*, 75 IND. L.J. 541, 543 (2000) (posing the question).

\(^{68}\) Wolfram, *supra* note 47, at 818-19. Often heard in debates is the cry that the ALI should hew to the majority of decisions. (This is often asserted without regard to the fact that only a handful of jurisdictions has passed on the point in question.) Opposed, of course, is the view—which we have striven to follow in the Restatement of The Law Governing Lawyers—that a substantive position in a Restatement is warranted as ‘restating’ the law if it can be rested on the support of at least one decision in an American jurisdiction. The Institute has occasionally departed from even that minimalist support position, as it did in adopting its disclosure-to-save-life provision at the 1996 Annual Meeting. And mini-debates will sometimes rage about what counts as minimalist support. Considered dicta? A reported trial court decision? A reported trial court decision in New York?

*Id.* (footnotes omitted).
B. Political Influence on the Restaters

The American Law Institute requires that its members, in order "[t]o maintain the Institute's reputation for thoughtful, disinterested analysis of legal issues, . . . speak, write, and vote on the basis of their own personal and professional convictions and experience without regard to client interests . . . ."69 Despite this institutional requirement, some recent criticism of the Institute has centered on allegations that the Restatements have been captured by special interest groups. In other words, even setting aside the debate as to whether the Restatements should be descriptive or normative, there is significant concern that the Restatements have become politically biased.70 The Institute's prestige and influence has made the group a natural target for interest-group lobbying.71 One scholar has employed a conflict-of-interest framework in expressing his concerns that political pressures have resulted in adulterated Restatements.72 Still others have denied adamantly any improper political influence on the American Law Institute's work.73

69. See ALI, About the ALI, supra note 42; see also ALI RULES OF THE COUNCIL 9.04 ("Members' Obligation to Exercise Independent Judgment").

70. Professor Frank Vandall has levied this allegation pointedly: "The Restatement (Third) [of Torts: Products Liability] is more like a trade journal, and the new perspective of the ALI is clear on its face." Vandall, supra note 52, at 814.

71. Wolfram states as follows:

The ALI has not been a stranger to the attention of interest groups. That might be attempted by an interested party, for example, by retaining a lawyer to exert whatever pressure could be brought to bear on the Restatement process. If the language ultimately adopted improves the position of a repeat-player litigant in a future court, the effort may make economic sense—whether or not the process or the result is desired by the ALI. Wolfram, supra note 47, at 820-21. Wolfram compares the political pressures on members of the American Law Institute to those facing contemporary members of the judiciary. In making this comparison, he states as follows:

It is now accepted in American law that such change-the-landscape decisions by courts, although rare, do occur in any field in which a court, as a practical matter, has discretion to reach different results on substantive issues, which is to say more or less in all fields. It might have been true at one time that potential, repeat-player litigants who might be burdened or benefited by a future judicial decision would not be motivated or disposed to take action to affect the result, unless the litigant was a party to the particular case raising the issue. The one conventional method by which a non-party could be heard on the question in the tribunal has been through the procedural device of submitting a brief as an amicus curiae. Another approach, rarely used, is for interested parties to sponsor academic research whose publication could possibly influence a tribunal's decision.

Still another possibility is to influence the shape of a Restatement-in-the-making.

Some courts have expressed a related concern that the Restatement process has been dominated by a few powerful, interested parties. This criticism raises the specter that the Restatements may, at times, represent the views of powerful individuals (most notably, Restatement reporters), rather than accurately presenting the common law—or even the American Law Institute's view of the common law. In addition, when conflicts of interest on the part of members of the ALI have called into question the integrity of ALI Restatements of the Law. That is, there is a significant and plausible risk that the independent professional judgment of ALI members has been materially and adversely affected by powerful pressures, including substantial financial inducements, to vote on Restatement issues in ways consistent with their clients' partisan interests. In addition, there is a significant and plausible risk that the independent professional judgment of ALI members regarding important Restatement provisions has been materially and adversely affected by their own financial interests, such as anticompetitive concerns and potential malpractice liability. These conflicts of interest have compromised the integrity of the ALI's Restatements of the Law to the point that no judge, scholar, or student can rely on a Restatement rule or comment as representing the objective judgment of members, unaffected by the partisanship of advocates who are creating precedents to protect their clients' and their own interests in future litigation.

Freedman gives as an example what he calls "a particularly important provision of the ALI's Principles of Corporate Governance." He recounts one member's claim that "[y]ou had corporations calling their outside counsel making it very clear how the client wanted the vote to come out" and further states that "[i]n accord with the desires of the corporate-client lobbyists, the members voted to reverse the judgment of the Reporters as expressed in their original draft." Id. at 643 (footnotes omitted).

73. James Henderson and Aaron Twerski, for example, served as Reporters for the highly controversial Restatement (Third) of Torts: Products Liability. Henderson and Twerski have stated unequivocally that, "In no meaningful sense of the term did we 'play politics' in our roles as drafters of the new Restatement." James A. Henderson, Jr. & Aaron D. Twerski, The Politics of the Products Liability Restatement, 26 HOFSTRA L. REV. 667, 667 (1998). Henderson and Twerski go on to state that "[l]aw, fairly articulated and evenly applied must, of necessity, impose constraints." Id. at 686. "Thus," they argue, "political opposition to the Products Restatement may stem not so much from what it says than from the fact that it says anything at all." Id. at 686-87. Victor Schwartz concurs as to the Restatement (Third) of Torts: Products Liability:

People on the advisory committee did not always "argue" from the point of view that might appear to be in their day-to-day professional interest. There were genuine, open-ended discussions where, from time-to-time, people were on the opposite side of where they might usually be "pegged" by the public or those who knew them. Schwartz, supra note 41, at 754. Schwartz goes on to state that "[i]t is absolutely incorrect to characterize the Restatement (Third) as a defense or plaintiff-oriented work product." Id. Nevertheless, Schwartz's use of the word "always" and the phrase "from time-to-time" does suggest that members of the American Law Institute often do, despite the institutional mandate to "leave one's clients at the door," take such considerations into account. ALI RULES OF THE COUNCIL 9.04.

74. In the case of Easter Seal Society for Crippled Children & Adults v. Playboy Enterprises, Inc., 530 So. 2d 643 (La. Ct. App. 1988), for example, the court examined the evolution of the tort of invasion of privacy. The court noted, as a preliminary matter, that this tort "was originally articulated neither by the common law nor the statutory law but in a law review article." Id. at 645. The court went on to characterize the modern development of this cause of action as involving four distinct branches, noting that "the most prominent proponent of this analysis [was] Dean William
an influential American Law Institute member is also a powerful judge, the Restatement can become a "self-fulfilled prophecy."75

Along the same lines are concerns regarding what former American Law Institute President Roswell Perkins called an "imbalance of representation."76 Of the Institute's approximately 3,600 members, only a small fraction normally attend the meetings at which draft Restatements are presented.77 One scholar has used these statistics to demonstrate "how client campaigns to 'get-out-the-vote' of lawyers who have been induced to vote a particular way can control the American Law Institute's position on Restatement provisions."78

Prosser, whose position as reporter allowed his view to be incorporated into the current substitute for the general common law, the American Law Institute's Restatements." Id. The court's holding implied that the Restatement reflected Dean Prosser's personal view and may not have been an accurate representation of the common law.

75. Calabresi & Cooper, supra note 60, at 867. Calabresi and Cooper relate the following story:

There is a story, perhaps apocryphal, about the Palsgraf case and the First Restatement of Torts. Supposedly, at about the time Palsgraf was to be decided, Judge Cardozo, who participated in the American Law Institute, traveled from Albany to New York for a meeting on the Restatement. At the meeting, there was a big argument on the issue of Palsgraf. . . . At a certain point, Cardozo is said to have said,

Well, I don't know whether what I am about to say is quite proper . . . but the Restatement, after all, should reflect the law as it is, as well as what we think it ought to be, and we have a case before us now that raises exactly this question. While I can't tell you for certain how it's going to come out, I think you ought to know that my best judgment is that the New York Court of Appeals is going to hold that negligence is relational . . . .

This, supposedly, was enough to swing the Restaters because, after all, New York is an important state, and if that was going to be the law of New York, the Restatement should reflect it.

Cardozo then returned to Albany, where he went into conference on the Palsgraf case. It was a very tightly divided court . . . . [I]n a quiet moment in the conference, Cardozo said, "Well, I don't know how much we should be affected by the Restatement, and of course they could change their minds, but I should tell you that I think that the Restaters are going to define negligence as relational." So, four to three, Palsgraf came out the way it did, and the Restatement became a self-fulfilled prophecy.

Id. Victor Schwartz raised similar concerns regarding Chief Justice Roger Traynor's opinion in the case of Greenman v. Yuba Power Prods., Inc. Schwartz, supra note 41, at 746-47 (citing Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1963)). Schwartz believed that Chief Justice Traynor had used his position as Chief Justice of the California Supreme Court to make case law to support a concept he desired to see adopted by the Restatements. Id.

76. Freedman, supra note 72, at 643.

77. According to Freedman, [at] one meeting dealing with the Restatement (Third) of The Law Governing Lawyers, for example, attendance varied from a high of 390 to a low of 150, and an important vote was decided by a vote of 110-80. Thus, the issue was determined by approximately five percent of the ALI membership.

Id. at 643-44 (footnote omitted).

78. Id. at 644.
III. WHY COURTS FOLLOW THE RESTATMENTS

Before this article examines the concerns raised by the Virgin Islands’ employment of the Restatements as the Islands’ de facto common law, it must acknowledge several arguments in favor of the Restatements. Because these arguments are not unique to the Virgin Islands, this section includes sources from a variety of jurisdictions. Three major arguments in favor of the Restatements are indicated below. Two depend on the Restatements’ accurately restating what the law is, rather than what it should be. After presenting each argument, this section will analyze the extent to which each may be of sufficient merit so as to outweigh any negative impact of imposing the Restatements as the de facto common law of a jurisdiction such as the Virgin Islands.

First, use of the Restatements may enhance the predictability of the common law. A court’s history of following the Restatements may make it easier for both litigants and other courts applying that jurisdiction’s law to predict the outcome of a matter of first impression. At least one court has described the task as otherwise being near-impossible.79

A second reason courts follow the Restatements is that the Restatements are deemed to represent the general common law of the United States, as well as it can be determined. This reasoning raises once more the debate, previously discussed, regarding the essential nature of the modern Restatements. The Arizona Court of Appeals has stated that “[o]ne of the reasons, if not the main reason that we follow the Restatement in the absence of prior Arizona decisions, is that the Restatement is supposed to represent the general law on the subject in the United States.”80 Another judge has made the similar statement that “[t]here is no substantial difference between the common law as incorporated in the Restatements and the common law of England as adopted and understood in the United States.”81 Statements like these

79. The United States Court of Appeals for the Seventh Circuit stated as follows in In re Air Crash Disaster:

Divining in the absence of any relevant authority how a state’s highest court would rule ordinarily would be as exact as foretelling the future from the flight of birds; however, in this case we have been spared such an exercise. The Arizona Supreme Court has repeatedly reaffirmed that, in the absence of a controlling statute or precedent, it will follow the Restatement of the Law whenever it is applicable.

803 F.2d 304, 310 (7th Cir. 1985).


81. Bishop v. Bishop, 257 F.2d 495, 503 (3d Cir. 1958) (Biggs, J., dissenting). Other courts’ positive statements regarding the nature of the Restatements, while somewhat more tentative than those stated above, are similar in tone. In Weinberger v. N.Y. Stock Exchange, for instance, the
tend to support arguments, such as those presented above, that the influence of the Restatements depends on their having at least the reputation of correctly restating the law. These arguments also assume that uniform law is a positive good. For matters of local law, this article will argue otherwise—that fit is more important than uniformity. In addition, it is important to acknowledge that it is not a universally accepted fact that the Restatements represent general law.82

A third reason courts may give for following the Restatements strikes even more directly to the core of this article's thesis that the Restatements tend to support the creation of artificial uniformity. This view is that the Restatements merely continue a natural trend of uniformity. One court described this progression toward uniform national common law as being a natural product of the similarity between views of policymakers nationwide.83 While acknowledging "centrifugal forces" leading to differences among jurisdictions, the court notes that "powerful centripetal tendencies often encourage the

United States District Court for the Southern District of New York stated, "[i]t is assumed that if federal common law were to be applied, under the exceptions implicit in Erie R.R. v. Tompkins,... it would follow the guidelines of the Restatement." 335 F. Supp. 139, 143 (S.D.N.Y. 1971). More recently, in Opp v. Wheaton Van Lines, Inc., the Seventh Circuit held that the federal courts have relied on the Restatement of Agency as a valuable source for establishing the federal common law of agency. 231 F.3d 1060, 1064 (7th Cir. 2000) (citing Moriarty v. Glueckert, 155 F.3d 859, 865-66 n.15 (7th Cir. 1998)).

82. See Cannon v. Dunn, 700 P.2d 502, 503 (Ariz. Ct. App. 1985) (rejecting the notion that the Restatement (Second) of Torts § 158 represented "general law on liability of the adjoining landlord for roots of trees spreading into the subsurface of the neighbor's land"); see also id. (citing Small v. Ellis, 367 P.2d 234, 237 (Ariz. Ct. App. 1961) for the proposition that "we do not follow the Restatement rule blindly," the court in Cannon made it clear that it would not apply the Restatement without a substantive consideration of the rule's merit); Albert A. Ehrenzweig, The Restatement as a Source of Conflicts Law in Arizona, 2 ARIZ. L. REV. 177, 178 (1960) (describing the Restatement of Conflicts of Law as "a dogmatic structure frequently lacking contact with the living law"). For this reason, Ehrenzweig argues that the Restatement in question should not be considered to be even persuasive authority. Id. at 177-78.

83. The United States District Court for the Eastern District of New York stated as follows in observing this phenomenon:

While those close to the American law scene tend to emphasize the diversity of substantive law among the states and between the states and the federal government, to outside observers much of the differences must appear as significant as that among the Lilliputians to Swift's hero. Faced with a unique problem, American lawmakers and judges tend to react in much the same way, arriving at much the same result. In re "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 690, 696 (E.D.N.Y. 1984). This article has included lengthy citations from this case because the court's analysis is the clearest and most self-aware published opinion on this point.

The Virgin Islands could be a notable exception here. Note, for example, how Louisiana's civil-law background has mattered significantly in the development of its law. Louisiana-trained lawyers may thus have a significant advantage over other U.S. lawyers with regard to the study of international law.
formulation of national consensus law." The court notes particularly "the essential homogeneity of our unified technological-social structure increasingly tied together by national transportation, communication and educational-cultural networks" and the "Anglo-American legal system with common roots and a strongly integrated law school educational system relying upon national scholars, treatises and cases." The court thus describes the National Conference of Commissioners on Uniform State Laws and the American Law Institute as aiding this trend toward uniformity. The end of the court's analysis, however, seems to leave an opening for arguments such as those in this article, by recognizing the importance of the "reasoning and pool of factual and legal data" that underlie the law. Another court, along the same lines, has called for greater uniformity among courts in at least some areas of state common law, as a matter of practical necessity.

Again, there is reason to believe that the Virgin Islands could constitute a notable and instructive exception to the assumption that law is naturally consistent from place to place. Were it not for the Senate's across-the-board imposition of the Restatements as the de facto common law of the Virgin Islands, the Islands, given their geographic isolation and demographic differences from the rest of the United States, might otherwise have contributed different and unique "reasoning and factual and legal data"—and thus different and unique law—to the pool available to American jurisdictions.

IV. THE NATURAL DEVELOPMENT OF THE COMMON LAW

To explain the manner in which the common law process has been altered in the Virgin Islands through the Senate's having made the Restatements the Islands' de facto common law, this section will first address briefly the process through which the common law normally is

84. Id.
85. Id.
86. The court states as follows:
   When presented with a new problem, we tend to proceed by analogy and by precedent. Analogies available are much the same for all courts. Even though one state is not bound by the precedents of another, when a new problem arises courts tend to follow the decisions of courts of other American jurisdictions since the reasoning and pool of factual and legal data will tend to be the same.
   Id.
87. Nichols v. Union Underwear Co., 602 S.W.2d 429, 432 n.1 (Ky. 1980) ("[T]he current system of having individual state courts develop product liability law on a case-to-case basis is not consistent with commercial necessity. Uniformity and stability in this area are desirable if product liability insurance rates are to be stabilized at reasonable levels.")
developed. Discussion will illuminate the manner in which the common law naturally (1) develops organically over time, (2) responds to contemporary local mores and needs, and (3) seeks to incorporate the lessons of experience. Once this section has discussed this process, it will compare the manner in which the common law has developed to date in the Virgin Islands.

One characteristic of the natural development of the common law is that it occurs incrementally.88 This first quality recognizes the value of a measure of consistency in the law over time.89 In The Laws, Plato speaks of the difficulty in making major changes in the law, using the expression “Hands off fundamentals” to describe the usual, negative response to wide-scale law reform, especially when core societal values are implicated.90 So significant are the difficulties in making widespread revisions to the law, that Plato recommends an experimental period when major changes in the law are contemplated.91 Only after that period of time has passed, and all difficulties have been ironed out, does he counsel that the law should be deemed complete.92

A second trait of the common law is that it is normally based upon considerations of fit and fairness.93 As Montesquieu states, the common law is intended to have a particularized fit for the jurisdiction that shapes it, so much so, that it could not simply be transplanted to a different jurisdiction.94 This conception of the law is consistent with Arthur Hogue’s description of the common law as raw, gritty “social rules,

88. In the case of Wilson v. Good Humor Corp., 757 F.2d 1293, 1314-15 (D.C. Cir. 1985) (Bork, J., concurring), Judge Bork quoted Justice Oliver Wendell Holmes, Jr. in describing the proper role of common-law judges. As Holmes stated, such judges “do and must legislate but . . . can do so only interstitially; they are confined from molar to molecular motions.” Id. (quoting S. P. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting)).
89. Meeks v. Opp Cotton Mills, Inc., 459 So. 2d 814, 815 (Ala. 1984) (Shores, J., concurring specially) (“I . . . believe that stability in the law is more desirable in some instances than equity.”).
91. Id. at 772 (“[T]hose who administer [the] laws from year to year will have to learn from experience and settle the details by annual refinements and amendments, until they think they’ve made the rules and procedures sufficiently precise. . . . This process should continue until every detail is thought to have received its final polish.”).
92. Id.
93. In Ito v. Macro Energy, Inc., 4 N. Mar. I. 46, 56 (N. Mar. I. 1993), the court held that, “[i]n the absence of legislation, the common law is developed based on the application of general notions of justice and fair play, taking into account the circumstances and experiences unique to a particular jurisdiction.” Id. at 56.
94. See MONTEESQUIEU, supra note 1, at 8 (“Laws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another.”); see also Carrow Co. v. Lusby, 804 P.2d 747, 752 (Ariz. 1990) (“As mandated by our legislature, we define and apply the common law to be ‘consistent with and adapted to the natural and physical conditions of our state.’”).
never remote from life." Montesquieu suggests that even the most
concrete characteristics of a jurisdiction—its climate, its religion, and its
major revenue sources—are ultimately relevant to the shaping of its
law. Speaking more generally of the good than of law, Spinoza speaks
of the importance of context and harmony in determining the value of
any thing—be it law or any other aspect of human life. This viewpoint
would call directly into question the wholesale adoption of the
Restatements—or any other body of uniform law—by any jurisdiction.
Indeed, Montesquieu recommends that those who might seek to transfer
the law of one jurisdiction to another should be cautious, to determine
first whether the two jurisdictions are sufficiently similar in political
institutions and political climate. Similarly, Thomas More generally
counsels against imposing foreign law, even if that law appears “more
elegant” in the abstract than the local product. Fit is, however, not

its long history the English common law has borne directly on the raw facts of daily life in English
society.”).

96. See MONTESQUIEU, supra note 1, at 9. Montesquieu elaborates as follows:
[The laws] should be related to the physical aspect of the country; to the climate, be it
freezing, torrid, or temperate; to the properties of the terrain, its location and extent, to
the way of life of the peoples, be they plowmen, hunters, or herdsmen; they should relate
to the degree of liberty that the constitution can sustain, to the religion of the inhabitants,
their inclinations, their wealth, their number, their commerce, their mores and their
manners; finally, the laws are related to one another, to their origin, to the purpose of the
legislator, and to the order of things on which they are established. They must be
considered from all these points of view.

id. In The Laws, Plato expresses a similar view. Plato, supra note 90, at 747 (describing the factors
to be taken in consideration with regard to the “climate” of a place and stating, “The sensible
legislator will ponder these influences as carefully as a man can, and then try to lay down laws that
will take account of them”).

1957) (1677) (“Insofar as a thing is in harmony with our nature, it is necessarily good.”). Elsewhere,
he describes perfection as being “reality,” or living in accordance with the “essence” of the thing,
whatever it might be. Id. at 81. Thus, the same thing (for example, the same law) could be “good,
bad, and indifferent,” in different contexts, as a matter of fit or misfit. Id. at 80-81 (“For example,
music is good for him that is melancholy, bad for him that mourns; for him that is deaf, it is neither
good nor bad.”).

98. See PLATO, supra note 90, at 610 (“As civil laws depend on political laws because they
are made for one society, it would be well if, when one wants to transfer a civil law from one nation
to another, one examines beforehand whether they both have the same institutions and the same
political right.”).

More’s analogy is to the performance of a play:
[T]here is . . . [a] sort of philosophy . . . suited to public affairs. It knows its role and
adapts to it, keeping to its part in the play at hand with harmony and decorum. This is the
sort you should use. Otherwise, during a performance of a comedy by Plautus, when the
slaves are joking around together, if you should come onto the stage dressed like a
philosopher and recite the passage from Octavia where Seneca argues with Nero,
synonymous with popularity, as Plato reminds the reader of *The Laws*, through the Athenian Stranger.\(^{100}\) Instead, law can be fair and appropriate without capturing social favor.

A third characteristic of the normal development of the common law is its dynamic quality.\(^{101}\) Plato’s description of the law as inherently over-rigid, related through the Stranger in *The Statesman*, is meant to remind the reader that dynamism is essential to the continuing validity of law.\(^{102}\) In addition, despite its shortcoming, the law is described in *The Statesman* as representing “the fruit of experience” that justifies its

wouldn’t it have been better for you to have a non-speaking part than to jumble together tragedy and comedy by reciting something inappropriate? By hauling in something quite diverse, you would spoil and distort the play being presented, even if what you add were better in itself. Whatever play is being presented, play your part as best you can and do not disturb the whole performance just because a more elegant play by someone else comes to mind.

\(\text{Id.}\)

100. *See Plato, supra* note 90, at 684 (“[M]ost people only ask their legislators to enact the kind of laws that the population in general will accept without objection. But just imagine asking your trainer or doctor to give you pleasure when he trains or cures your body!”).


Before stating the common law rule that is followed in Arizona and the reason for the rule, it would be well to remember the function of common law judges and the role of the common law. The main characteristic of the common law is dynamism. It does not remain static. The common law is not a thing of chiseled marble to be left unchanged for centuries.

\(\text{Id.}\)


Law can never issue an injunction binding on all which really embodies what is best for each; it cannot prescribe with perfect accuracy what is good and right for each member of the community at any one time. The differences of human personality, the variety of men’s activities, and the inevitable unsettlement attending all human experience make it impossible for any art whatsoever to issue unqualified rules holding good on all questions at all times.

\(\text{Id.}\) Because of these limitations, the Stranger goes on to state, “we shall find [the legislator] making law for the generality of his subjects under average circumstances.” \(\text{Id.}\) at 295.
imposition. This statement brings to mind the famous saying of Oliver Wendell Holmes, "The life of the law has not been logic: it has been experience."

This third trait brings to mind one scholar's description of the function of common law judges as having changed over time, from discovering the law and declaring the law in their decisions, to managing the evolution of the law. At least two courts have described the task of "managing the evolution of the law" as being a central responsibility of the judiciary. One scholar has gone a step further, arguing that this duty cannot properly be delegated—especially not to the American Law Institute.

The wholesale adoption of the Restatements is, of course, not interstitial, by definition. In addition, although a Restatement-based

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103. Id. at 300b (concluding that "[a]ny man who dares by his action to infringe these laws is guilty of a wrong many times greater than the wrong done by strict laws, for such a transgression, if tolerated, would do even more than a rigid code to pervert all ordered activity").

104. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881) ("The law embodies the story of a nation's development through many centuries."); cited in Nulle v. Gillette-Campbell County Joint Powers Fire Bd., 797 P.2d 1171, 1173 (Wyo. 1990). The court went on to hold as follows: We have not hesitated to overrule cases that were based on what was perceived to be the common law at the time the decisions were handed down. We are justified in overruling prior cases grounded on the common law if they stand for an unfair and improper rule or have outlived their usefulness, and do not meet changing needs.

Id.

105. Wade, supra note 65, at 62-63. Having so stated, Wade described the Restatements as changing over time appropriately to reflect this change in the common law-making process.

106. Fuhrman v. Total Petroleum, Inc., 398 N.W.2d 807, 815 (Iowa 1987) ("The common law is developed by the courts and is a part of our responsibility.") The court went on to state as follows:

That responsibility includes reevaluation of previous decisions, especially those based on matters of public policy, and in reevaluating past decisions we do not depart from the proper role of the judiciary. As Mr. Justice Cardozo observed, regarding changes in the common law: "This is not usurpation. It is not even innovation. It is the reservation for ourselves of the same power of creation that built up the common law through its exercise by the judges of the past."

Id.; see also State v. Horne, 319 S.E.2d 703, 704 (S.C. 1984) ("This court has the right and the duty to develop the common law of South Carolina to better serve an ever-changing society as a whole.").

107. Ehrenzweig, supra note 82, at 178. Ehrenzweig states in relevant part as follows:

Where a case is not covered by statute or precedent, every court has the power and duty to adjudicate the case before it in the light of what it considers just in the particular case. It cannot divest itself of this power and duty by leaving the decision to another governmental body, let alone a private institution like the American Law Institute.

Id.

108. Indeed, the adoption of any uniform body of law can constitute a radical change. The Virgin Islands got a taste of this phenomenon in a different context in March 2002 when it adopted new Articles 1 and 9 of the Uniform Commercial Code and repealed Article 6. The V.I. Bar Herald reported the development as a "dramatic" and "radical" change. From 1962 to 2002: The New Virgin Islands Uniform Commercial Code, V.I. BAR HERALD, Mar. 11, 2002. Virgin Islands
common law might be relatively dynamic, the changed provisions may not be consistent with the fabric of the community, or even fair within that local context. Instead, the common law is to be carefully crafted by human hands—to borrow phraseology from Roscoe Pound—rather than by the mechanical application of any body of law.

In addition, to the extent that adoption of the Restatements has chilled the perceived need for legislation, it could be argued that the Virgin Islands Senate has derogated its duties with regard to the creation of the law. Montesquieu has described the Senate as having a unique role in protecting the mores of the people, and appropriate law-making would seem to be a key exercise of this role. Machiavelli would describe the United States, as the Islands’ purchasing nation (perhaps even the conquering nation, in a sense), as having an important role with regard to the preservation of the independent law-making function of the Islands, as its dependency. Machiavelli describes this support for the rule of law as an opportunity for legitimacy-building. This need to reinforce good law-making is particularly acute when the “conquering” nation seeks to maintain the dependent nature of the “conquered,” as the United States arguably has done in maintaining the Virgin Islands as a dependency rather than allowing the Islands to achieve statehood.

Uniform Law Commission Chair Tom Bolt echoed this sentiment: “We have gone from 1962 to 2002 in less than 2 years. We have completely new commercial law….”

109. A criticism of the Virgin Islands’ use of the Restatements might borrow from the language of the Lewis court’s opinion, that Virgin Islands courts must “succe..." supranote 49, at 70. 111. MONTESQUIEU, supra note 1, at 49 (“The Senate must, above all, be attached to the old institutions and see that the people and the magistrates never deviate from those.”); see also id. at 50 (describing the Senate as “the depository of the mores”).

112. Machiavelli describes acquisition of another by purchase as being no easier, and no more stable, than acquisition by conquest. NICCOLÒ MACHIAVELLI, THE PRINCE 19-22 (Norton 1977) (1515) (describing the problems that arise, after the acquisition, under such circumstances).

113. Id. at 139 (“Conquest is an acquisition; the spirit of acquisition carries with it the spirit of preservation and use, and not that of destruction.”).

114. Id. at 74 (“Nothing does so much honor to a man newly risen to power, as the new laws and rules that he discovers. When they are well-grounded and have in them the seeds of greatness, these institutions make him the object of awe and admiration.”).

115. Id. at 144 (“When a republic holds a people dependent, it must seek to make amends for the drawbacks that arise from the nature of the thing by giving the people a good political right and good civil laws.”).
V. THE EVOLUTIONARY BIOLOGY ANALOGY

This portion of the article will introduce the evolutionary biology analogy, which provides a framework for the argument that the Virgin Islands are a "legal backwater" that is worth studying. The essence of the argument is that isolated populations often produce new species.\(^{116}\) Thus, the very fact that the Islands have been geographically, socially, and politically isolated from the United States in some significant ways could lead to their becoming an important resource for the future development of the law. At least one other scholar has identified isolated island societies as being productive laboratories for observing the development of the law.\(^{117}\)

In referring to the Virgin Islands as a "backwater" of the law, this article is employing that part of the term's definition that refers to "isolation," rather than using the definition pejoratively to suggest that the Virgin Islands' legal system is backward.\(^{118}\) Five features of the Islands might lead one to describe them as a backwater. First, the Islands are geographically separate from the rest of the United States.\(^{119}\) Second,
they are small in size and produce few products for export. Third, most citizens of the Virgin Islands are members of an ethnic group that has suffered centuries of marginalization in the United States. Fourth,

120. The Islands as a whole are only twice the size of Washington, DC. See Walters, supra note 28, at 35. "The land area of the islands covers 133 square miles." Taylor, supra note 28, at CRS-1. According to the 2000 Census, the population of the Virgin Islands was 108,612. Population and Housing Profile: 2000: Geography: U.S. Virgin Islands, available at www.census.gov/Press-Release/www/2002/usvifullprofile.pdf (last visited Nov. 16, 2004). In 1988, the population was estimated at 109,500. See Taylor, supra note 28, at CRS-3. This figure makes the population of the Islands comparable to that of Topeka, Kansas. There is little arable land, as the Islands are generally hilly, and most food products must therefore be imported. Id. at CRS-1 ("The Virgin Islands of the United States consist of more than fifty islands, islets, and cays, most of which are uninhabited and uninhabitable."); id. at CRS-10-11 (citing the Islands' "scarcity of water, the mountainous terrain, and the poor soil" as factors creating difficulty for the agricultural industry); id. at CRS-11 ("According to the Virgin Islands Agricultural Extension Service [in 1988], about 95% of the foodstuffs continue to be imported to the Islands. (St. Thomas imports virtually 100% of foodstuffs.) Almost all feed stocks continue to be imported as well."). In addition to the difficult terrain, the Islands are vulnerable to natural hazards that include several recent hurricanes, droughts and floods, and sometimes earthquakes. Other current environmental issues include concerns regarding limited natural freshwater resources, an outdated sewage system, and overflowing landfills. Id. at CRS-2 (stating that "[t]he water supply in the islands remains a serious problem" and describing remedial efforts); see also CIA World Factbook 2003, at http://www.cia.gov/publications/factbook/geos/cq.html (last visited Nov. 16, 2004) (noting, as a current environmental issue, the lack of natural freshwater resources).

Tourism, and the two million visitors to the Islands each year, account for more than 70% of the Islands' Gross Domestic Product and 70% of employment. Taylor, supra note 28, at CRS-7 ("Tourism is the largest industry of the Virgin Islands."). The tourism industry is driven by the Islands' natural beauty and attractive climate. Id. at CRS-2 (describing the "near-perfect climate, with a temperature range of 70 to 90 degrees at sea level"); see also id. at CRS-8 (describing the Islands' attractions). Tourism in the Islands has been in a several-year slump but seems to be improving in the past several years with United and Continental Airlines each having added direct flights to the Islands in 1999. See Governor Charles W. Turnbull, State of the Territory 2001 Address, available at http://www.usvi.org/sot2001.html (also describing American Airlines and U.S. Airways as having increased direct flights by 15%). As of 1988, the territorial government remained the largest employer in the Islands. See Taylor, supra note 28, at CRS-18 (indicating that the government employs more than 31% of the workforce).

The Islands' limited manufacturing sector includes plants engaged in petroleum refining, textile work, electronics, watch assembly, and the manufacture of pharmaceuticals. See id. at CRS-14 (describing the watch industry in the Virgin Islands); Id. at CRS-15 (regarding the Hess Oil Virgin Islands Corporation). In addition, "[t]he manufacture of rum has been for a long time one of the major industries of the Virgin Islands." Id. at CRS-13. The Islands are also trying to attract international businesses and financial services, which currently comprise a small part of the economy. See Turnbull, supra.

121. The population currently is 78% Black, 14% Caucasian, and about 8% of other ancestry. Population and Housing Profile: 2000: Geography: U.S. Virgin Islands, available at www.census.gov/Press-Release/www/2002/usvifullprofile.pdf. The Islands also currently suffer from economic woes. The Islands' economy during the 18th and early 19th centuries was driven by sugarcane grown and harvested with slave labor. See Taylor, supra note 28, at CRS-59 (describing the rise and fall of the sugar industry in the Virgin Islands); see also La Motta, supra note 28, at 21 ("From 1777 to 1807, as sugar cane speedily covered the island [of St. Croix], the annual average of sugar exports reached 10,778 tons."); see also Taylor, supra note 28, at CRS-75 (describing the
little immigration occurs between the United States and the Virgin Islands, and there is therefore little mixing of the Virgin Islands’ population with that of the rest of the United States. Fifth, although the citizens of the Virgin Islands are also citizens of the United States, they have only one Representative in the United States House of Representatives, have no representation in the United States Senate, and do not participate in the election of the President of the United States. This geographic, social, and political isolation arguably makes the Virgin Islands a “backwater” of the United States.

The field of evolutionary biology views backwaters as important resources for growth. Simply stated, evolution, as that term is used in the field of biology, is a process of descent with modification. The lineage of organisms changes over time, and diversity arises because lineages descending from common ancestors diverge through time.
language of evolutionary biology has been employed to describe the manner in which the law changes over time to fit the needs of a specific community as well. The term most relevant to an understanding of how this analogy works, within the framework of the law, is "speciation." Speciation is the process by which a single species becomes two or more species and is considered by many biologists to be the key to understanding how biological evolution takes place. There are two major forms of speciation: allopatric and sympatric speciation. This article employs the former. Allopatric speciation, thought to be the more common form, occurs when a given population splits into at least two geographically isolated subdivisions that organisms are not able to bridge. Eventually, the two populations' gene pools change in a manner independent of one another until they cannot interbreed even if

126. For a description of how the Law & Biology movement, which the author describes as being in its "adolescence," informs the study of the law, see E. Donald Elliott, Law and Biology: The New Synthesis?, 41 ST. LOUIS L.J. 595 (1997). Elliott also chronicles the development of the movement since the time of its founding by Margaret Gruter in the 1980s. Id. at 596. Another excellent general resource is LAW & EVOLUTIONARY BIOLOGY: SELECTED ESSAYS IN HONOR OF MARGARET GRUTER ON HER 80TH BIRTHDAY (Lawrence A. Frolik ed., Gruter Inst. for L. & Behavioral Research 1999). For a thoughtful critique of what the author terms the too-frequent, often imprecise use of the evolutionary biology analogy to describe the development of the law, see M.B.W. Sinclair, Evolution in Law: Second Thoughts, 71 U. DET. MERCY L. REV. 31, 43 (1993) ("When one is wedded to a theoretical position, one will also, quite naturally and with no intent to deceive oneself or others, orient the collection of empirical data towards confirmation of that theory, then stop looking when the theory is fulfilled.").

127. ERNST MAYR, EVOLUTION AND THE DIVERSITY OF LIFE: SELECTED ESSAYS 117 (Harvard Univ. Press 1976) ("Speciation is the multiplication of species, that is, the division of one parent species into several daughter species."); see also STEPHEN JAY GOULD, THE STRUCTURE OF EVOLUTIONARY THEORY 612 (Harvard Univ. Press 2002) (describing how species branch into daughter species through the process called speciation). As Gould indicates, speciation can occur through "bifurcation[,] . . . where, after branching, the two descendant species both accumulate differences from an ancestor then recorded as extinct," or through "cladogenesis[,] . . . where one daughter species arises with . . . differences, but the ancestral species persists in stasis." Id. at 817. When we speak of a legal system that speciates through isolation, we necessarily are speaking of a system of cladogenesis, since the ancestral species (here, the law of the United States or Denmark, depending on the period in the Virgin Islands' history being considered) remains extant.

128. See GOULD, supra note 127, at 817-18.

129. See MAYR, supra note 127, at 144 (describing the competing research between biologists who were focusing on each kind of speciation, and further describing Mayr's attempt to show the superiority of allopatric speciation theory).

130. See GOULD, supra note 127, at 535 (noting the "primary role of geographic isolation as a sine qua non" of allopatric speciation, and further noting the "near universality" of the theory of allopatric speciation); see also MAYR, supra note 127, at 141 ("Isolation as such is not an active factor which produces a character but is a factor which merely preserves a character produced by some other factor; isolation has, therefore, no direct effects."). Sympatric speciation, on the other hand, involves only reproductive isolation without geographic isolation. GOULD, supra note 127, at 780 (describing this model).
they happen to come back together. When this process is complete, the two groups have speciated. Geographic isolation is critical to allopatric speciation. Other than geographic isolation, there are no other factors required to ensure that speciation will occur. Sympatric speciation, on the other hand, involves reproductive isolation without geographic isolation. The process of allopatric speciation includes four steps: "mutation, recombination, selection, and isolation."

Speciation is a creative process resulting in dynamic, complex systems that have been described as "poised on the boundary... between order and chaos." The new species thus created are definitionally different from the ancestor species. As such, they have a separate identity from the ancestor species. Not all geographic variation that emerges through speciation reflects the need for adaptation to a new environment; some is merely the result of chance and a matter

131. See MAYR, supra note 127, at 141.
132. See id.
133. See id. at 129 ("It is now realized that the acquisition of isolating mechanisms is the crucial step in the process of speciation."); GOULD, supra note 127, at 779 (noting that "most new species arise from small populations peripherally isolated at the edges of a parental range"). Gould goes on to note that daughter species "arise rapidly... in geological time,... both... in a small geographic region (the peripheral isolate), and... elsewhere (beyond the borders of the parental range)."
134. See id. at 535-36 ("Isolation itself, and the severing of gene flow, rendered any population ripe for speciation... With the least isolation, the first minor gaps [between subspecies] will appear."); MAYR, supra note 127, at 146 ("Two steps are thus involved in speciation: (1) the establishment of new populations and (2) the establishment of intrinsic reproductive isolation.").
135. GOULD, supra note 127, at 780 (describing this model, which involves only "reproductive isolation").
136. MAYR, supra note 127, at 189 (describing these as the "four cornerstones of evolution").
137. GOULD, supra note 127, at 1211 ("Selection achieves and maintains complex systems poised on the boundary, or edge, between order and chaos. These systems are best able to coordinate complex tasks and evolve in a complex environment."). See id. at 1214 (referring to another scholar's work describing the "benefits provided by residence at the edge of chaos").
138. Id. at 612 ("Species certainly vary, for the defining property of reproductive isolation demands genetic differentiation from parents and collateral relatives.").
139. Id. at 606 ("[S]pecies are individuals—in some cases much ‘better’ individuals than conventional bodies of organisms—by all vernacular criteria."). Gould describes his criteria for individuality as including discreteness, cohesion, functionality, and organization, among other factors. See id. at 602-03; see also MAYR, supra note 127, at 484:

A species consists of a group of populations which replace each other geographically or ecologically and of which the neighboring ones intergrade or hybridize wherever they are in contact or which are potentially capable of doing so (with one or more of the populations) in those cases where contact is prevented by geographical or ecological barriers.

Id.
of variety,\textsuperscript{140} characteristics that at least arguably make speciation an even more valuable resource to the ancestor species.

Employing the language of speciation, because of the Virgin Islands' unique history and identity and its geographic, political, and social isolation from the rest of the United States, the Islands naturally may have tended to develop law diverging from that of the rest of the States in a manner narrowly tailored to serve the needs of the Islands' population.\textsuperscript{141} Because, however, the Islands have adopted the Restatements by statute as de facto common law, this process either may not have taken place at all or may have taken place only to a limited extent.\textsuperscript{142}

In addition, evolutionary biology recognizes the concept of invasion and its potential destructiveness. The Virgin Islands, having had foreign law imposed on them for so many centuries, were naturally vulnerable to legal invasion.\textsuperscript{143} The wholesale adoption of the

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\item 140. Gould, \textit{supra} note 127, at 535 ("It should not be assumed that all the differences between populations and species are purely adaptational and that they owe their existence to their superior selective qualities.").
\item 141. The Islands have, for example, developed a local government consisting of an elected governor and a fifteen-member unicameral senate. See Taylor, \textit{supra} note 28, at CRS-40. Governor Charles W. Turnbull currently is in the third year of his first term in office. Virgin Islands governors are elected for four-year terms. \textit{CIA World Factbook 2003}, \textit{supra} note 120.
\item 142. One of the many useful critiques that I received on this article in draft form relates to this point. It is indeed possible that the Virgin Islands' adoption of the Restatements reflects the Islands' desire, as a matter of exactly the kind of self-determination for which I advocate in this article. Many thanks to Jo Ann Palchak for helping me to collect and refine my thoughts on this matter. It was Spinoza who stated that Nature abhors a vacuum. \textit{Baruch Spinoza, The Ethics} 41 (Joseph Simon 1981) (1677). Thus there will be a natural trend toward gap-filling, as an organic process. As a part of this dynamic, the Islands may very well have made an affirmative decision in favor of the Restatements, for precisely the kinds of reasons enumerated in Section III. These arguments may ultimately reveal that the Restatements were not an invasive species in the sense that is contemplated in this section. This would not, however, ultimately negate the fact that the wholesale adoption of the Restatements effectuated a very real displacement of the common-law-making process. For this reason, I believe their example merits the in-depth treatment that this article provides.
\item 143. Prior to the United States' becoming owner of the Virgin Islands in 1917, the Islands had been subject to Danish rule, on and off, for 350 years. There is some tendency among contemporary Virgin Islanders to romanticize the period of Danish colonial rule. \textit{Highfield}, \textit{supra} note 121, at 1 ("It has become a truism among many Virgin Islanders, especially among older ones, that the years before the transfer of the islands to the United States in 1917 could be viewed as 'the good old days.'"). Denmark colonized Saint Thomas in 1666, and the Danish West Indies Company controlled the Islands privately until 1755, when Denmark's King Frederick bought them. Taylor, \textit{supra} note 28, at CRS-49, CRS-50 (describing the colonization of St. Thomas). In 1800, during the Napoleonic Wars, Britain blockaded Saint Thomas and occupied the island in 1801. \textit{Id.} at CRS-52 (describing British occupation during the Napoleonic period). In 1802, Denmark once again gained control of Saint Thomas. \textit{Id.} Then, from 1802 to 1815, the British again occupied the Islands until they were once more restored to Denmark in 1815. \textit{Id.}
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Restatements might fairly be described as an invasion. Applying the analogy to the development of the common law, the interruption of the normal common-law-making process may actually be affirmatively harmful. Montesquieu recognizes the phenomenon of invasion. He acknowledges the temptation—and danger, due to inevitable misfit—of a conquering state’s imposing its own law on another. Baruch Spinoza describes this preference for the familiar as a natural—but not a beneficent—human phenomenon. Machiavelli, likewise, recognizes the inherent difficulties in the first years of any new government and

From 1917 to 1931, the Islands were governed by the Department of the Navy. Id. at CRS-39. Virgin Islanders remember this era as one of heavy-handedness on the part of the Naval Government. HIGHFIELD, supra note 121, at 1 (describing the “unhappy results of that 14-year stay” and the “battleship mentality” of the Naval government). Until 1927, residents of the Virgin Islands were not citizens of the United States. Id. at 7 (stating that the United States “define[d] the erstwhile Danish subjects as citizens in the United States but not citizens of the United States” until 1927); La Motta, supra note 28, at 161 (“On February 25, 1927, President Calvin Coolidge signed a Congressional bill granting U.S. citizenship to Virgin Islanders.”). This matter was the subject of surprise and disappointment to many Islanders who believed they would become citizens upon the expiration of a one-year waiting period, as early as 1918. Id. at 69 (describing the celebration of Citizenship Day, complete with review of the parade by the Governor, in January 1918). It appears that this decision had racial overtones. Id. at 70 (“The State Department based its ruling on the fact that black islanders had been subjects, but not citizens of Denmark.”).

In 1931, jurisdiction over the Islands was transferred to the Department of the Interior, and the President appointed the Islands’ first civil governor. Taylor, supra note 28, at CRS-39; see also La Motta, supra note 28, at 71 (“According to the [Congressional] Act [of 1917], the President had the right to appoint the islands’ governor, but in actual practice, the Secretary of the Navy chose the Naval officers he wished to fill the post.”). More than seventy years after the Islands ceased to be governed by the United States Navy, some military presence remains. The United States Marine Corps now maintains both an air base on the island of Saint Thomas and an airfield on Saint Croix.

144. MONTESQUIEU, supra note 1, at 287 (with regard to military invasion, noting that “nothing is nearer to devastation than invasion”).
145. Id. at 329.

As one likes to establish elsewhere what is established at home, it would give the form of its own government to the people of its colonies. . . . The conquered state would have a very good civil government, but it would be crushed by the right of nations; the laws imposed upon it from one nation to another would be such that its prosperity would be only precarious, and only a deposit for a master.

146. SPINOZA, supra note 97, at 78-79 (“[M]en are wont to style natural phenomena perfect or imperfect rather from their own prejudices, than from true knowledge of what they pronounce upon.”). Spinoza uses the analogy of watching a house being constructed by another person: [A]fter men began to form general ideas, to think out types of houses, buildings, towers, etc., and to prefer certain types to others, it came about that each man called perfect that which he saw agree with the general idea he had formed of the thing in question, and called imperfect that which he saw agree less with his own preconceived type, even though it had evidently been completed in accordance with the idea of its artificer.

Id. at 78. He goes on to describe as “hateful” any attempt to force another to conform with one’s own conception of the good. Id. at 99.
advises, particularly by way of transition, that the former laws and customs be maintained as a matter of stability.\textsuperscript{147}

In trying to Americanize the Virgin Islands, the United States has imposed its own values and preferences in a number of ways.\textsuperscript{148} At least some sources suggest that the Virgin Islanders have resisted homogenization into the American culture, conscious of their unique identity.\textsuperscript{149} The legislature of the Northern Mariana Islands expressed similar sentiments in a very concrete way, demanding a locally-selected appellate judiciary.\textsuperscript{150}

Thomas More asserts that conquerors often lose interest in their new possession, when it comes to creating an appropriate and lasting government.\textsuperscript{151} More's statements, which describe the difficulty in transitioning from a military to a civil government, are descriptive of the Virgin Islands, which was under Navy rule for the first 14 years of its history as a United States dependency.\textsuperscript{152} The disinterest More described was apparent during this time in the Islands' history: once the United States had purchased the Islands and thereby neutralized their potential threat in enemy hands, the Islands lost the federal government’s

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\item \textsuperscript{147} MACHIAVELLI, supra note 112, at 5, 6 ("[A] new prince must always harm those over whom he assumes authority, both with his soldiers and with a thousand other hardships that are entailed in a new conquest."). He goes on to state, “nothing is harder to manage, more risky in the undertaking, or more doubtful of success than to set up as the introducer of a new order." \textit{Id.} at 17.
\item \textsuperscript{148} La Motta, supra note 28, at 10 ("Nowhere else was the process of Americanization more intense than in the U.S. Virgin Islands. Even more than in Puerto Rico, where a different language and a stronger national identity mitigated American influence, the colonial administrators of the Virgin Islands applied American-style solutions to local problems."). La Motta goes on to give the following illustration: “Virgin Islanders attended schools named after U.S. Presidents, studied curricula designed for territorial New Mexico and Utah, and learned to celebrate American holidays." \textit{Id.}
\item \textsuperscript{149} \textit{Id.} at 11-12 ("Virgin Islanders constantly demanded that federal policies be modified to meet local expectations."). Stated another way, “Virgin Islanders wanted to be Americans, but they refused to allow colonial officials to define the terms of Americanization." \textit{Id.} at 16.
\item \textsuperscript{150} Commonwealth v. Super. Ct., 1 N. Mar. I. 287, 298 n.4 (N. Mar. I. 1990) (Hillblom, J., concurring) (describing the Commonwealth Judicial Reorganization Act of 1989). Judge Hillblom went on to state as follows:

The people of the Northern Mariana Islands, through their elected legislators, clearly wanted a local appellate court chosen and confirmed by their representatives. Rightly or wrongly, they believed that the members of the judicial branch must directly experience the effects of their decisions. Living in the Northern Mariana Islands and seeing the impact of their decisions is important.

\textit{Id.}
\item \textsuperscript{151} MORE, supra note 99, at 16-17 ("[T]he princes themselves, almost all of them, are more devoted to military pursuits... than they are to the beneficent pursuits of peacetime; and they are far more interested in how to acquire new kingdoms by hook or crook than in how to govern well those they have already acquired.").
\item \textsuperscript{152} See supra note 1455 and accompanying text.
\end{itemize}
attention. 153 Perhaps the wholesale imposition of the Restatements is the natural and inevitable result of the Islands’ history of dependency as the preceding several paragraphs have recounted. The Restatements may, simply because they come from a “private legislature,” be substantively different from traditional legislation in significant ways. Two scholars have argued that private legislatures produce rules that are at times “vague and imprecise” and at other times “crude but precise,” “not because of their intrinsic virtues as instruments for social control,” but rather “in consequence of a particular institutional dynamic.” 154 When a jurisdiction, such as the Virgin Islands, adopts the entirety of the Restatements as de facto common law, these concerns become particularly acute.

In addition, some courts have expressed discomfort with the lack of discretion afforded to judges in jurisdictions, like the Virgin Islands and the Northern Mariana Islands, that have adopted the Restatements as de facto common law. As Roscoe Pound notes, the degree of discretion that should properly be afforded to judges in applying the law is a question dating back to Aristotelian times. 155 Ultimately, Pound sees the exercise of judicial discretion as an appropriate means of guaranteeing the fit and fairness of the law in meeting local needs—but only when it is accomplished openly rather than through indirection. Pound notes the cyclical nature of judicial involvement in what he calls the “individualization” of the law. 156 At the extreme, he notes, are those

153. La Motta, supra note 28, at 66 (“With naval bases on Cuba and Puerto Rico, the Virgin Islands were important only if occupied by an unfriendly country; once under U.S. control, the islands lost their strategic value, leaving the Navy only the task of managing the internal affairs of the colony.”); id. at 88 (“[F]ederal disinterest kept the Navy in control of the Islands. Until the economic collapse of 1930 forced President Hoover to intervene, Virgin Islanders wondered if their new country had not forgotten them.”).
154. Alan Schwartz and Robert Scott have studied the institutional structures of “private legislatures” such as the American Law Institute and have described the utility functions their participants maximize. Alan Schwartz & Robert E. Scott, The Political Economy of Private Legislatures, 143 U. PA. L. REV. 595, 597, 651 (1995) (comparing public and private legislatures in this respect).
155. POUND, supra note 49, at 53 (“The idea that there is no administrative element in the judicial decision of causes and that judicial application of law should be a purely mechanical process goes back to Aristotle’s Politics.”).
156. Id. at 55 (“Carried too far in the stage of equity and natural law, overdevelopment of the administrative element brings about a reaction, and in the maturity of law individualization is pushed to the wall once more.”). Pound goes on to state that “justice comes to be administered in large measure through the application of legal standards which admit of a wide margin for the facts of particular cases, and the application of these standards is committed to laymen or to the discretion of the tribunal.” Id. at 55-56.
judges who take the law merely as "a general guide." He describes the current, hidden means by which individualization is accomplished as being injurious to the law, even if necessary, and counsels in favor of a system of law that would legitimize and standardize judicial individualization of the law, thus making subterfuge unnecessary. Pound states, however, that the better the legislation, the less need for judicial discretion. Like Pound, Austin favors the exercise of judicial discretion, and describes what is commonly called "judge-made law" as being often superior in substance to the product of legislatures. Without legitimizing the practice of judge-made law (unlike Pound and Austin), Hart describes the phenomenon as inevitable.

The wholesale adoption of the Restatements has been described as reducing the freedom of the affected local courts in fashioning their own common law. One court has gone so far as to indicate that it believed the jurisdiction's wholesale application of the Restatements generally precluded the court from making law based upon public policy, unless

157. Id. at 59. Pound states as follows:
To a large and apparently growing extent the practice of our application of law has been that jurors or courts, as the case may be, take the rules of law as a general guide, determine what the equities of the cause demand, and contrive to find a verdict or render a judgment accordingly, wrenching the law no more than is necessary.

Id.

158. Id. at 60 ("We need a theory which recognizes the administrative element as a legitimate part of the judicial function and insists that individualization in the application of legal precepts is no less important than the contents of those precepts themselves."). Describing the current system of subterfuge as "destructive of certainty and uniformity," Pound goes on to state, "If the courts do not respect the law, who will?" Id. He adds, later in this chapter, "Only a saint, such as Louis IX under the oak at Vincennes, may be trusted with the wide powers of a judge restrained only by a desire for just results in each case to be reached by taking the law for a general guide." Id. at 63. Like Pound, Austin criticizes the subterfuge, not the idea of individualization. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 191 (Prometheus Books 2000) (1832) (decrying the "timid, narrow, and piecemeal manner in which [judges] have legislated" and the fact that judges have acted "under cover of vague and indeterminate phrases . . . which would be censurable in any legislator").

159. POUND, supra note 49, at 69 ("Where legislation is effective, . . . mechanical application is effective and desirable. Where legislation is ineffective, the same difficulties that prevent its satisfactory operation require us to leave a wide margin of discretion in application.").

160. AUSTIN, supra note 158, at 191 ("That part of the law of every country which was made by judges has been far better made than that part which consists of statutes enacted by the legislative."). Austin describes this function as being necessary "to make up for the negligence or the incapacity of the avowed legislator." Id.

161. See H.L.A. HART, THE CONCEPT OF LAW 12 (Oxford Univ. Press 1997) (1961) ("It is only the tradition that judges 'find' and do not 'make' law that . . . presents their decisions as if they were deductions smoothly made from clear pre-existing rules without intrusion of the judge's choice.").

162. See Ito v. Macro Energy, 4 N. Mar. I. 46, 56 (N. Mar. I. 1993). In Ito the court held that "Our jurisdiction is not vested with a similar degree of freedom in formulating our own common law as that exercised by courts in other jurisdictions, because of the statutory dictate that we apply the Restatement." Id.
THE FOLLY OF UNIFORMITY?

that policy was already reflected in local law.\textsuperscript{163} Along the same lines, at least one litigant in the Northern Mariana Islands has claimed that the statute adopting the Restatements as de facto common law is unconstitutional because it violates the doctrine of separation of powers, is void for vagueness, deprives citizens of their right to vote, and has the effect of legislation without representation.\textsuperscript{164} A final argument, similar in tone, stems from concerns that the courts, in employing the Restatements, or the legislatures, in insisting that they do so, have improperly delegated authority to the American Law Institute. One judge raises the prohibition against “federal common law” in articulating this concern.\textsuperscript{165} The stakes, as he sees them, are nothing less than the independence and autonomy that our federal system requires.\textsuperscript{166}

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  \item \textsuperscript{163} See Castro v. Hotel Nikko Saipan, Inc., 4 N. Mar. I. 268, 275 (N. Mar. I. 1995) (“If we are to formulate a rule based on public policy, the policy must be implicated in either local law or a recognized need to safeguard the welfare of the general public.”).
  \item \textsuperscript{164} In Bolalin v. Guam Publications, Inc., 4 N. Mar. I. 176, 181 (N. Mar. I. 1994), the plaintiffs argued that application of Restatement provisions pursuant to 7 CMC § 3401 is unconstitutional. “Specifically, they argue that (1) it violates the separation of powers doctrine under NMI Const. art. II, § 1, (2) is tantamount to ‘legislation without representation’ under NMI Const. arts. VII and VIII, and denies CNMI residents the right to vote under NMI Const. art. II, § 1, and (3) is void for vagueness.” \textit{Id.} at 181 n.11. Because, however, these arguments were raised for the first time on appeal, the court declined to consider these issues. \textit{Id.} at 181. The court also noted as follows, in affirming the lower court:
  
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    \item Our courts have repeatedly applied the common law as expressed in the Restatements, pursuant to 7 CMC § 3401, when our own local written and customary law is silent regarding an issue presented. Such was the case here. The trial court duly applied Restatement provisions in the absence of local law.
  \end{itemize}
  \textit{Id.} at 182. The court therefore suggested that it would have held the statute to be constitutional even if the challenge had been raised below.
  \item \textsuperscript{165} In Wilson v. Good Humor Corp., 757 F.2d 1293 (D.C. Cir. 1985), Judge Bork’s concurrence criticizes the trend toward what he sees as near-automatic application of the Restatements:
    
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      \item [T]he majority apparently believes that we should adopt the Restatement rule in this case because in the past the District of Columbia courts have sometimes looked to the Restatement for guidance in resolving difficult issues of law. But there is no presumption that if a local court sometimes relies on the Restatement, that court will rely on it for all future propositions as well. It will often be tempting for federal courts in diversity cases simply to follow the Restatement rules where local law is silent. The Restatement, after all, seems authoritative and claims the support of numerous cases. This is a temptation which we must resist, however, since a practice of always following the Restatement would be very much like adopting the American Law Institute’s conclusions as federal common law. Under \textit{Erie} we must not assist in the creation of a “federal general common law.”
    \end{itemize}
  \textit{Id.} at 1312 (citing \textit{Erie} R.R. v. Tompkins, 318 U.S. 64, 78 (1938) (Brandeis, J.)).
  \item \textsuperscript{166} In footnote 10 of the \textit{Wilson} opinion, Judge Bork states as follows:
    
    \begin{itemize}
      \item It is well to remember Justice Field’s classic comments on the federal common law which were quoted approvingly by Justice Brandeis in \textit{Erie}:
    \end{itemize}
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VI.  FIT AND AUTHORITY: JUDICIAL ATTEMPTS AT FINDING SOLUTIONS

The final section of this article will address the extent to which courts have imposed effective limits of the Restatements' authority, regardless of whether the Restatements constitute persuasive or controlling authority in the relevant jurisdiction. This section of the article will explore the extent to which these techniques have ameliorated any distorting effect the Restatements might otherwise have had on the development of the common law. Several of the techniques the courts have employed with regard to the Restatements bring to mind the tools that the Honorable Guido Calabresi, professor and dean emeritus of the Yale Law School and judge on the United States Circuit Court of Appeals for the Second Circuit, has described with respect to courts' responses to statutes generally.167

One way in which courts have an opportunity to make meaningful decisions about the use of the Restatements is to make careful determinations about those that are in draft form, as well as those that are arguably past their useful life, rather than applying them automatically. Courts have struggled with the proper weight to be afforded a Tentative Draft Restatement and the continuing weight to be given a Restatement that is perceived as being out-of-date.168 This struggle is one with which legal philosophy is familiar, in examining the nature of authority and the twin questions of (1) whether old law is still law, and (2) whether new law is law yet. In addressing the former question, Hume describes the changes that can occur with time, even

I am aware that what has been termed the general law of the country—which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject—has been often advanced in judicial opinions of this court to control a conflicting law of a State. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a State in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine. But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, . . . the autonomy and independence of the States.

757 F.2d at 1312 n.10.

167.  See generally CALABRESI, supra note 118, at 16-90 (describing techniques common-law courts have employed to cope with statutes that fit poorly with the rest of the jurisdiction's legal landscape).

168.  To keep the issue in perspective, it may be useful to keep in mind that a Restatement may be called a Tentative Draft, having already been approved by the advisors to that particular Restatement and sometimes also the members consultative group, once it receives the approval of the Council of the Institute, a group of sixty. See ALI, About the ALI, supra note 42.
with regard to what was formerly a settled issue: "A man's title, that is clear and certain at present, will seem obscure and doubtful fifty years hence, even tho' the facts, on which it is founded, shou'd be prov'd with the greatest evidence and certainty." 169 In addressing the latter question, Hume describes the phenomenon of acquisition of new property "by accession," when the new property is "connected in an intimate manner with objects that are already our property, and at the same time are inferior to them." 170 Borrowing language from Hume, a tentative draft Restatement could be described as connected intimately with, yet inferior to, a Restatement that is already in force in a given jurisdiction. Hume describes the process of acquiring new property in this way as being near-automatic, and not necessarily involving any substantive examination of the new property, to determine how its characteristics might differ from the old. 171 As described above in Part II, this phenomenon, if extended from accession of property to accession of new Restatement pronouncements, may be of particular concern as the Restatements have changed in nature over time.

Hart, similarly, describes "continuity" and "persistence" as being "salient features of most legal systems." 172 Both are as much a problem with the transition from one Restatement to another, and the continued authority of an old Restatement, as with the transition from one ruler to another, and the continued authority of rules made by a former ruler, which are the situations that Hart describes. With regard to the former question of continuity, Hart notes as a preliminary matter that "[t]he mere fact that there was a general habit of obedience to Rex I in his lifetime does not by itself even render probable that Rex II will be

169. DAVID HUME, A TREATISE OF HUMAN NATURE 3.2.3 (David Fate Norton & Mary J. Norton eds., Oxford Univ. Press 2000) (1739-40). Hume states as follows: "Any considerable space of time sets objects at such a distance, that they seem, in a manner, to lose their reality, and have as little influence on the mind, as if they had never been in being." Id. (also noting that "[t]he nature of human society admits not of any great accuracy; nor can we always remount to the first origin of things, in order to determine their present condition"). This phenomenon exists, Hume states, because "[t]he same facts have not the same influence after so long an interval of time." Id.

170. Id. at 3.2.3 ("Thus the fruits of our garden, the offspring of our cattle, and the work of our slaves, are all of them esteem'd our property, even before possession.").

171. Id. at 3.2.3.

Where objects are connected together in the imagination, they are apt to be put on the same footing, and are commonly suppos'd to be endow'd with the same qualities. We readily pass from one to the other, and make no difference in our judgments concerning them; especially if the latter be inferior to the former.

Id.

172. HART, supra note 161, at 50 (describing "the continuity of the authority to make law possessed by a succession of different legislators, and the persistence of laws long after their maker and those who rendered him habitual obedience have perished").
habitually obeyed.”

Until Rex II demonstrates his sovereignty, Hart indicates, “there will be an interregnum in which no law can be made.” To prevent the interruption of law-making power, he goes on to state, legal systems traditionally enact rules of succession. A jurisdiction might specify in advance, for example, that each new Restatement is automatically to become law at some point in time, either as a Tentative Draft or upon final adoption by the American Law Institute. In the absence of express rules of succession, the courts of the Virgin Islands have been left to determine these matters for themselves, with varying results.

Hart describes persistence as being in essence the same issue as continuity. He notes, as a preliminary matter, that persistence is not automatic. As was the case with the question of continuity, however, Hart asserts that the matter of persistence can be handled effectively through clear lawmaking that specifies that laws continue past the lifetimes of their makers, lasting until they are affirmatively changed.

Again, because the Virgin Islands have not expressly addressed this issue, courts have been required to decide these matters for themselves.

The courts of the Virgin Islands have, on several occasions, followed Tentative Draft Restatements. In one case, finding that the final revisions had been completed such that the only remaining task was the printing of the document, the court held that the Tentative Draft

173. *Id* at 52. ("There is as yet no established habit of obedience to Rex II... There is nothing to make him sovereign from the start. Only after we know that his orders have been obeyed for some time shall we be able to say that a habit of obedience has been established.").

174. *Id*.

175. *Id* at 53 (describing "rules which bridge the transition from one law-giver to another... regulat[ing] the succession in advance, naming or specifying in general terms the qualifications of and mode of determining the law-giver").

176. *See infra* notes 180–85 and accompanying text.

177. HART, supra note 161, at 61 ("The answer to this problem of 'Why law still?' is in principle the same as the answer to our first problem of 'Why law already?'").

178. *Id* at 58 ("Of course, acceptance of a rule by a society at one moment does not guaranttee its continued existence.").

179. *Id* at 61-62 (describing a rule under which, "[w]hen the individual ruler dies his legislative work lives on; for it rests upon the foundation of a general rule which successive generations of the society continue to respect regarding each legislator whenever he lived").

180. *See infra* note 187 and accompanying text.

181. In Remole v. Sullivan, the court considered whether to enforce an arbitration clause by specific performance, noting that "the decision to enforce or not [was] complicated by the Virgin Islands' reliance on the restatements of the law." 17 V.I. 193, 195 (V.I. Terr. Ct. 1981) (citing 1 V.I.C. § 4 (1967)). The court went on to hold that "[t]he task is made difficult because sections of the Restatement of Contracts on this precise issue conflict with the Restatement (Second) of Contracts (Tent. Draft No. 12, March 1, 1977) (approved May 17, 1977)." *Id*.
could appropriately be considered the most recent (and most authoritative) statement on point by the American Law Institute. The court’s analysis rested on its determination that the relevant portion of the Tentative Draft had been retained in the version as finally approved by the full membership of the American Law Institute. At least two other courts, while noting that a Tentative Draft is not as persuasive as a final product, similarly chose to follow the draft as the most up-to-date expression of the law on point. Still another did its own comparison of the draft and existing Restatements with case law, ultimately finding the draft provision to be more reflective of the most current Supreme Court holdings on point. These two courts’ reliance on a Tentative Draft

182. The Remole court adopted the Tentative Draft, noting that “Tentative Draft No. 12 was approved subject only to editorial revisions and without § 339, which is inapplicable to this case.” Id. at 195 n.2 (citing 54 A.L.I. PROC. 155 (1978)). “As an approved Restatement,” the court concluded, “the rules of Tentative Draft No. 12 must be used as the rules of decision by Virgin Islands’ courts.” Id. at 197. (citing 1 V.I.C. § 4). The court held as follows, in reaching this conclusion:

The mere delay in printing the Restatement (Second) of Contracts does not weaken its authority any more than a court’s slip opinions are less authoritative because of the delay in their formal publication in bound volumes. Even if the printing delay perpetuates the new Restatement’s status as a tentative draft, there is a persuasive reason for following it. When the Restatement no longer reflects the common law, an accurate statement of the law in a tentative draft should be used as binding authority. This is especially true when, as in this case, the court is asked to choose between an anachronism from the 1932 Restatement of Contracts and the tentative draft’s accurate expression of prevailing law.

Id. (citations omitted).

183. In Varlack v. SWC Caribbean, Inc., 550 F.2d 171 (3d Cir. 1977), the court noted the defendants’ argument that, although 1 V.I.C. § 4 looks to the Restatements as a representation of United States common law, “a tentative draft [does not rise] to the same dignity as the final section as approved by the American Law Institute.” Id. at 180. The court responded as follows:

[W]e read the statute as looking to the Restatements only as an expression of “the rules of common law”; we do not believe it contemplates strict adherence to old Restatements which no longer accurately summarize the common law. Admittedly, a Tentative Draft is not as persuasive a source of information on “the rules of common law” as is a draft which has received final approval. But we are satisfied that the weight of authority now lies behind the position in the Tentative Draft of the Second Restatement [of Torts], rather than that contained in the First Restatement, which dates from 1939.

Id. See also Torres v. Bennett, 13 V.I. 443, 454 (V.I. Terr. Ct. 1977) (citing Varlack and choosing, like the Varlack court, to adopt the position set forth in the Restatement (Second) of Torts, then in Tentative Draft form).

184. Clarenbach v. Consol. Parts, Inc., 17 V.I. 123, 130 (V.I. Terr. Ct. 1980) (citing Varlack, 13 V.I. at 180, for the proposition that “1 V.I.C. § 4 (1967) does not mandate strict adherence to old Restatements which no longer accurately reflect the state of the common law”). The Clarenbach court went on to hold that “[i]t is the opinion of this Court, particularly in light of the recent Supreme Court decisions on the subject, that the Restatement (2d) of Judgments § 88 (Tent. Draft No. 2, 1975) supersedes the position adopted by the First Restatement with respect to application of collateral estoppel by a non-party.” 17 V.I. at 130.
therefore was based, not upon the American Law Institute's ultimate acceptance of the provision in question, but rather upon each court's independent determination that the provision more accurately reflected United States common law than that contained in the First Restatement that it was to replace. In addition, at least one Virgin Islands court has rejected the application of a Tentative Draft Restatement, based on the holding that these works in progress are not entitled to the same degree of reliance as those that have been promulgated by the organization as final products. 185 Finally, one court has adopted a compromise position, recognizing that the Tentative Drafts are not controlling, as they would be if they were finally adopted, but describing them as having strong persuasive authority. 186 What remains unclear is whether a Virgin Islands court would adopt a Tentative Draft Restatement without considering either, as the first court did, whether the Draft had become part of the Institute's final product or, as the other courts did, the relevant individual provision's substantive merit.

An additional case suggests that Virgin Islands courts may at times discard an outdated Restatement rule in favor of the larger body of common law as developed to date. 187 Thus, at least one Virgin Islands court has interpreted 1 V.I.C. § 4 as requiring courts not to apply Restatement provisions blindly, but rather to apply only those provisions that accurately represent United States common law on point.

Courts also may limit the application of the Restatements by insisting that they be interpreted in context and in conjunction with general principles of equity. 188 This approach is consistent with Pound's

185. Action Engr. v. Martin Marietta Alumina, 18 V.I. 485, 497 n.5 (D.V.I. 1981) ("Although this court has tempered its reliance on the Restatements in view of the date of their publication [citing James v. Bailey] and on occasion we have utilized the tentative drafts, we are in no manner obligated to accept positions proposed in the tentative drafts.").

186. Marcelly v. Mohan, 16 V.I. 575, 583 (V.I. Terr. Ct. 1979) ("Tentative drafts of the restatements not as yet approved by the American Law Institute, while not rising to the same dignity as if finally approved, are a persuasive source of information on the rules of common law.").

187. Haize v. Hanover Ins. Co., 536 F.2d 576 (3d Cir. 1976). The Haize court held that "[i]t could be argued that the 1942 Restatement of Judgments no longer expresses the rules of the common law to the extent it requires mutuality, and that therefore the common law 'as generally understood and applied in the United States' governs." Id. at 578 n.1 (citing James v. Bailey, 370 F. Supp. 469 (D.V.I. 1974)). In addition, in at least one case, a litigant tried in vain to convince the court that a Restatement was outdated and should be discarded. Bank of Nova Scotia v. St. Croix Drive-In Theatre, Inc., 728 F.2d 177, 181 (3d Cir. 1984) (noting one party's argument that the Restatement of Security was "old" and "no longer reflect[ed] the common law accurately").

188. In James v. Bailey, the court stated as follows: I do not feel that the imposition through 1 V.I.C. § 4 of the Restatement as the rule of decision in this case precludes me from taking cognizance of and applying well recognized principles of equity which temper the effect of this rule. The Restatement
view of equity as "a remedial system alongside of the law, taking the law for granted and giving legal rights greater efficacy in certain situations."\textsuperscript{189} Aristotle, similarly, describes equity as superior to the law, in that it is a "rectification of legal justice," where the latter can be erroneous in its application to a particular case.\textsuperscript{190} Equity, generally understood, thus allows a court fully to effectuate justice within the bounds of the law.

In addition, several courts have limited the application of the Restatements by insisting that they not be applied to create new causes of action or to change old causes of action absent legislative intervention.\textsuperscript{191} In explaining its holding, one Northern Mariana Islands court discussed 7 C.M.C. § 3401, a statute of the Northern Mariana Islands that, like 1 V.I.C. § 4, "provides for the almost wholesale application of the rules of law, in the absence of written or customary law, [and stated that § 3401] is a broad statute in existence since the days

\textsuperscript{189} POUND, supra note 49, at 65 ("Such was the orthodox view of the relation of law and equity. Equity did not alter a jot or tittle of the law.").

\textsuperscript{190} THE ETHICS OF ARISTOTLE 1137 (J.A.K. Thompson trans., 1955). Aristotle goes on to state as follows:

The explanation of this is that all law is universal, and there are some things about which it is not possible to pronounce rightly in general terms; therefore in cases where it is necessary to make a general pronouncement, but impossible to do so rightly, the law takes account of the majority of cases, though not unaware that in this way errors are made. . . . So when the law states a general rule, and a case arises under this that is exceptional, then it is right, . . . to correct the omission by a ruling such as the legislator would have given if he had been present there, and as he would have enacted if he had been aware of the circumstances.

\textit{Id.}

\textsuperscript{191} See, e.g., Borja v. Goodman, 1 N. Mar. I. 225 (N. Mar. I. 1990). In Borja v. Goodman, the court addressed the relative responsibilities of the legislature and courts, as follows:

Any change to the common law rule of defamation, including the available defenses, should come from the legislature. The reason for this is that courts are generally not equipped to address such changes. The wisdom of the general application to the Commonwealth of the rules of the common law (as laid out in the Restatements of the Law), in the absence of written or customary law, is a matter that is ordinarily best left to the legislature. I would agree that there may be occasions when specific applications of certain common law rules would not be appropriate. I am not, however, persuaded that the duty appellant urges us to impose on defendants is justifiable in the instant case.

\textit{Id.} at 238 (footnote omitted).
of the Trust Territory Administration.” The court characterized the statute as a “shorthand’ attempt to fill a gap due to the absence of statutory laws in many areas.” The court’s characterization begs the question of whether, as the law in the Northern Mariana Islands continues to develop, the Restatements should become a less important part of this development process. In addition to the majority’s assertion that § 3401 represents a “shorthand” attempt to fill gaps in the Commonwealth’s law, the concurrence describes the Commonwealth’s “almost wholesale” application of the Restatements as a second reason to interpret their provisions narrowly, so as to prevent courts from going too far in taking over what is naturally a legislative function.

Another court, in holding similarly, has asserted that it believes it has the responsibility to assess each proposed new cause of action according to “principles of justice” and its substantive merits, rather than “blindly” adopting Restatement provisions that would create such causes of action. Indeed, refusal to adopt new Restatement provisions “blindly” is a theme that shows up in other opinions as well.

192. Id. at 238 n.4.

193. Id. The concurrence echoed this characterization interpreting the statute and stated that “[t]he purpose of 1 TTC 103 was not to make laws of a foreign jurisdiction applicable as a substitute for laws of the Trust Territory but, rather, to provide substantive law absent ‘written law’ covering the given subject.” Id. at 248-49 (Hillblom, J., concurring).

194. Id. at 248 (Hillblom, J., concurring).

1 TTC 103 adopts the law found in the Restatement. The adoption of the Trust Territory Code 103 is an adoption of a specific statute. However, the Trust Territory Code section 103 does not expressly adopt a specific statute but adopts the Restatement in its entirety. Here, a body of law rather than specific laws are made applicable by reference. When a court is called upon to apply and pick and choose from such a large body of laws it in fact legislates, a function which is traditionally reserved to the people or the legislature. Thus, I believe we should construe such statutes narrowly. I would construe 7 CMC § 3401 as applying if the court determines there is no “written law” in the Northern Mariana Islands applying to the subject matter of the case and controversy at issue. This ruling would not prohibit the court from looking to the law of other jurisdictions in the process of interpreting “written law” but the court could not apply as substantive law 7 CMC § 3401 where “written law” exists.

Id. (footnotes omitted).

195. See Small v. Ellis, 367 P.2d 234, 237 (Ariz. 1961). The Arizona Supreme Court declined to use the Restatements to create a new cause of action, even though the court had “previously stated that where not bound by previous decisions of this court or legislative enactment we will follow the Restatement of the Law.” Id. at 236 (quoting Ingalls v. Neidlinger, 216 P.2d 387, 390 (Ariz. 1950)).

We think it would be unwise to follow this rule blindly, particularly when to do so would result in the recognition of a new cause of action in this jurisdiction. In view of our former pronouncements, great weight must be given to the recognition of this, right in the Restatement of the Law, but notwithstanding this, we deem it our duty to consider the merits of this new right. If it is based on principles of justice, and has been generally
Other courts, on the other hand, have been willing to follow the Restatements even when doing so changes the jurisdiction’s law on point. One court has indicated that its willingness to do so stems from the fact that other courts tend to do the same. The court, in other words, seems to have adopted the Restatement rule because other courts had accepted it, without weighing its merit independently. Another court has given the Restatement provision dispositive authority, holding that it was unnecessary to cite any authorities other than the Restatement, in support of a particular point being argued. Still another has held that the Restatement’s endorsement of a position is not in itself dispositive but is sufficient to allow a litigant to escape directed verdict.

acknowledged elsewhere, there would seem to be no reason why the cause of action should not be considered as existing here.

Id. at 237 (quoting Reed v. Real Detective Pub. Co., 162 P.2d 133, 138 (Ariz. 1945)). The court’s consideration of whether the Restatement provision in question was supported by “principles of justice” brings to mind the language the Ito court used, see discussion supra note 93, in describing the natural development of the common law.

196. See, e.g., DeLoach v. Alfred, 952 P.2d 320, 322-23 (Ariz. Ct. App. 1997), vacated on other grounds, 960 P.2d 628 (Ariz. 1998) (“Notwithstanding the general rule that we will follow the Restatement, we will not do so blindly.”).


The American Law Institute Restatement of the Law of Torts makes a clear statement which is on its way toward general acceptance as the rule of manufacturer’s liability . . . . This section has been expressly cited and approved in numerous Federal and state court decisions. In many recent decisions of U.S. Courts of Appeal, the extent of the duty of the manufacturer has not even been discussed, it being assumed that the manufacturer did have a duty of care extending beyond the persons with whom he had contractual relations.

Id. Having so held, the court concluded that, “[u]pon all the foregoing it cannot be imagined that the Maryland Court of Appeals would deny the liability of Garzell Plastics in the circumstances here presented.” Id. at 486.

198. See Matthís v. Kennedy, 67 N.W.2d 413, 419 (Minn. 1954) (“It is unnecessary to cite any further decisions or authorities in view of the fact that the American Law Institute in its Restatement of the Law of Torts (1938) has in its chapter on defamation stated the rule as it relates to classes of privilege . . . .”).


[W]e do not, as the concurrence states, “endorse[e] the Restatement even though [we] disapprove of what the Restatement says.” We conclude that the plaintiffs offered sufficient evidence to go to the jury under a circumstance-specific peculiar risk theory based on the evidence that the defendant took no action, including its vendors, designed to minimize a specific known risk. That theory of liability, firmly rooted in the Restatement, is enough to defeat a directed verdict.

Id. (citations omitted). The court stated, “[w]e do not seek to impose the whole of sections 413 or 427 onto the law of the District of Columbia—even for the purpose of deciding this case.” Id. at 1308. The court concluded, however, by reaffirming the persuasive authority of the Restatements: “we can confidently say that if local courts behave in the future as they have in the past, they too will look to the Restatement for guidance in determining difficult and novel issues of tort law.” Id.
In contrast to those courts that have refused to allow the Restatements to create a new cause of action, absent legislative involvement, are those insisting that the legislature indicate if any Restatement provisions are not to become law. At least one Virgin Islands court has assumed that its task is to apply all Restatements in the absence of controlling law on point, not simply those Restatement provisions that accurately represent United States law on point.\textsuperscript{200}

The unique history of the Virgin Islands provides an additional means by which Virgin Islands courts may limit the application of Restatement principles. When there is law that pre-dates the United States ownership of the Virgin Islands, i.e., Danish law, such law will take precedence over the Restatements. Such situations are particularly likely to arise in property law disputes.\textsuperscript{201} Thus, although Virgin Islands courts are bound by statute to apply Restatement provisions in the absence of controlling authority on point, a flexible definition of the term "controlling authority" may at times allow a consideration of law dating back as early as 1666.\textsuperscript{202}

Another way in which Virgin Islands and Northern Mariana Islands courts can control their reliance on the Restatements is to define carefully the kind of cases in which they constitute controlling authority. One area of substantive dispute within the Virgin Islands and Northern Mariana Islands is whether the Restatements govern in the absence only of statutory law, or in the absence of any written law, including local case law or customary law. Several courts have found that the

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  \item \textsuperscript{200} In the case of Monk v. Virgin Islands Water & Power Authority, the court held as follows: Unlike other jurisdictions, where the Restatement merely serves as a summary of general legal principles for courts to accept or reject, the Virgin Islands has designated the Restatements as its law, until a contrary statute is approved. Therefore, if the Virgin Islands wishes to abrogate the doctrine of assumption of risk, along with Section 343A of the Restatement, its legislature must say so, as it did in 1973 with contributory negligence. 53 F.3d 1381, 1387-88 (3d Cir. 1995).
  \item \textsuperscript{201} See Red Hook Marina Corp. v. Antilles Yachting Corp., 9 V.I. 236, 241-42 (D.V.I. 1971) (rejecting the application of United States common law which presumed United States ownership of land in the Virgin Islands under certain tidal water conditions because "the rules of common law do not necessarily govern property relationships in the Virgin Islands."). The court clarified as follows: Anglo-American common law has been received into Virgin Islands jurisprudence only in relatively recent times. Therefore, property rights in the islands are rooted in the law existing while the islands were under Danish sovereignty, which law remained in force even after the transfer of sovereignty to the United States in 1917. These rights were preserved after cession by treaty and generally understood rules of international law and remained unaffected as well by the later adoption of common law. Id.
  \item \textsuperscript{202} See supra note 143 (providing a brief timeline of the Islands' history under Danish rule).
\end{itemize}
Restatements apply only when there is no local precedent on point whatsoever. Additionally, at least one court has expressly stated that local customary law is to be given precedent over U.S. common law in this calculus. Others, however, have stated that only local statutory law on point will preempt the automatic application of the Restatements. In addition, at least one court has expressly stated that the Restatements outrank local case law.

Bringing together several of the themes from this section, the strongest statement by a Virgin Islands court choosing not to follow the Restatements comes from Murray v. Beloit Power Systems, Inc. The Murray Court declined to follow the position advanced by either litigant as to the relationship between the tort defense of contributory negligence and the doctrine of assumption of the risk. Setting aside the Restatement (Second) of Torts provision on point, the court crafted its own rule of

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204. See In re Estate of Rofag, 2 N.M.I. 18, 32 n.7 (N. Mar. I. 1991) ("7 CMC § 3401 generally upholds customary law by giving it priority over common law.").

205. See Tenorio v. Reliable Collection Agency, Inc., No. 02-Civ-0038, 2003 WL 23150110, at *4 (D.N. Mar. I. Dec. 31, 2003) ("In the absence of statutory law, Commonwealth courts look to the law 'as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States.'"). This court then went on to allow the Restatement to create a new cause of action for invasion of privacy in the jurisdiction. See id.; see also V.I. Distributor, Inc. v. Durkee Foods, 19 V.I. 85, 92 (D.V.I. 1982) ("The restatements of law approved by the American Law Institute are only pertinent if there are no existing applicable Virgin Islands statutes.").

206. See Prime Hospitality Corp. v. Gen. Star Indem. Co., No. 1997-Civ-91, 1999 WL 293865 at *2 n. 8 (D.V.I. Apr. 29, 1999) ("[C]ourts in the Virgin Islands look first to enactments of the Virgin Islands Legislature, then to the common law as embodied in the Restatements, then to decisions of local courts when no Restatement is on point, and finally to the general common law of the United States.").

decision, grounded in the concept of comparative fault. 208 This case illustrates several recurring themes: (1) the argument that, to be authoritative, the Restatements must be descriptive of the current state of the common law, rather than the state of the law as the American Law Institute believes it should be; 209 (2) the dynamic nature of the common law; 210 (3) the prerogative (and even responsibility) of the judiciary with regard to the development of the common law; 211 and (4) the desire, wherever possible, to follow the “best law,” law that has been uniformly recognized as such by other jurisdictions. 212 The Murray court used each principle as an opportunity for crafting an individualized holding that represents reasoned lawmaking at its best.

VII. CONCLUSION

One item of which readers may take note is that many of the cases and a number of law review articles cited in this article date back to the 1950s and 1960s. In many ways this fact may show why this area merits attention at this time; namely, that few recent courts have been so self-aware as to consider the manner in which Restatements are employed. 213

In addition to the passage of time, the last time a large number of courts seriously considered the appropriate role of the Restatements was during an era in which the Restatements themselves were different. The Restatements have become more normative over time and also have become increasingly vulnerable to interest group politics. Many courts, however, have continued to employ the Restatements in the same near-

208. Id. at 1147 (“[I]t is the opinion of this Court that the imputation of comparative negligence principles, as defined herein, in strict products liability cases will provide the most equitable means of ascertaining ultimate tort liability.”).

209. Id. (citing Varlack, 550 F.2d at 180, for the proposition that “the restatements constitute the rules of decision in the Virgin Islands only to the extent that they accurately express prevailing rules of common law”); see also supra notes 80-82 and accompanying text.

210. Murray, 450 F. Supp. at 1147. (citing Co-Build Cos., Inc., 570 F.2d at 495 for the proposition that “this Court has the power to deviate from prevailing rules of common law to create ‘local laws to the contrary’ within the meaning of 1 V.I.C. § 4”); see also supra notes 101-07 and accompanying text.

211. Murray, 450 F. Supp. at 1147. (“The prevailing rules of common law constitute no more than rules of decision, and though binding as such on foreign jurisdictions seeking to apply Virgin Islands law, are binding on local courts only in the absence of local case law or statutory law to the contrary.”).

212. Id. (“[T]here is an absence of a genuine, overwhelming consensus among the various American jurisdictions as to the application of the defense of contributory negligence in the realm of strict products liability.”).

213. Alan Schwartz and Robert Scott raise this concern as well. See Schwartz & Scott, supra note 154, at 650 (“Private law-making groups such as the ALI and NCCUSL have not received serious scrutiny”).
automatic fashion as they have since the project’s inception. As of April 1, 2003, the Restatements had been cited a total of 158,183 times.\footnote{214}{ALI, 2003 Annual Report, available at http://www.ali.org.}

This continuing fidelity to a changed product is of particular concern in jurisdictions such as the Virgin Islands and the Northern Mariana Islands, in which the Restatements have been adopted as de facto common law. In addition to concerns about whether the Restatements continue to merit such reliance, there is a second cost to the Restatements’ use in these two jurisdictions. Because these groups of Islands are backwaters in the United States legal system, employing an evolutionary biology analogy, the “speciated” common law the Islands would have naturally developed might otherwise have been an excellent resource from which the rest of the country could have benefited.

Courts that apply the Restatements should not do so without analyzing their substantive merit. The 1998 case of \textit{Ramirez v. Health Partners of Southern Arizona}\footnote{215}{972 P.2d 658 (Ariz. Ct. App. 1998).} provides an excellent example of how this may be accomplished. In considering the application of the \textit{Restatement (Second) of Torts} to a matter involving the donation of parts of a human body, the court held, “we must consider whether the Restatement position, as applied to a particular claim, . . . is consistent with Arizona law and policy, and has generally been acknowledged elsewhere.”\footnote{216}{Id. at 665.} This approach is consistent with the way in which common law courts historically have attempted to consider justice, fit, and fairness, in making decisions regarding the development of the common law.\footnote{217}{See supra notes 93-100 and accompanying text.} The American Law Institute should welcome this recommendation as pushing toward (and expanding confidence in) the development of a Restatement product and helping to ensure that the Restatements fulfill their intended purpose.